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**United States Court of Appeals  
For the Ninth Circuit**

LARRY P. SMITH, et al., *Appellants*,  
vs.  
HILLTOP REALTY, INC., et al., *Appellees*,

HILLTOP REALTY, INC., et al., *Cross-Appellants*,  
vs.  
LARRY P. SMITH, et al., *Cross-Appellees*,  
and  
THE AUSTIN COMPANY,  
*Additional Cross-Appellee as to Count No. 4 only.*

**ON APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON**

**OPENING BRIEF OF LARRY P. SMITH, ET AL.,  
AS APPELLANTS**

**FILED**

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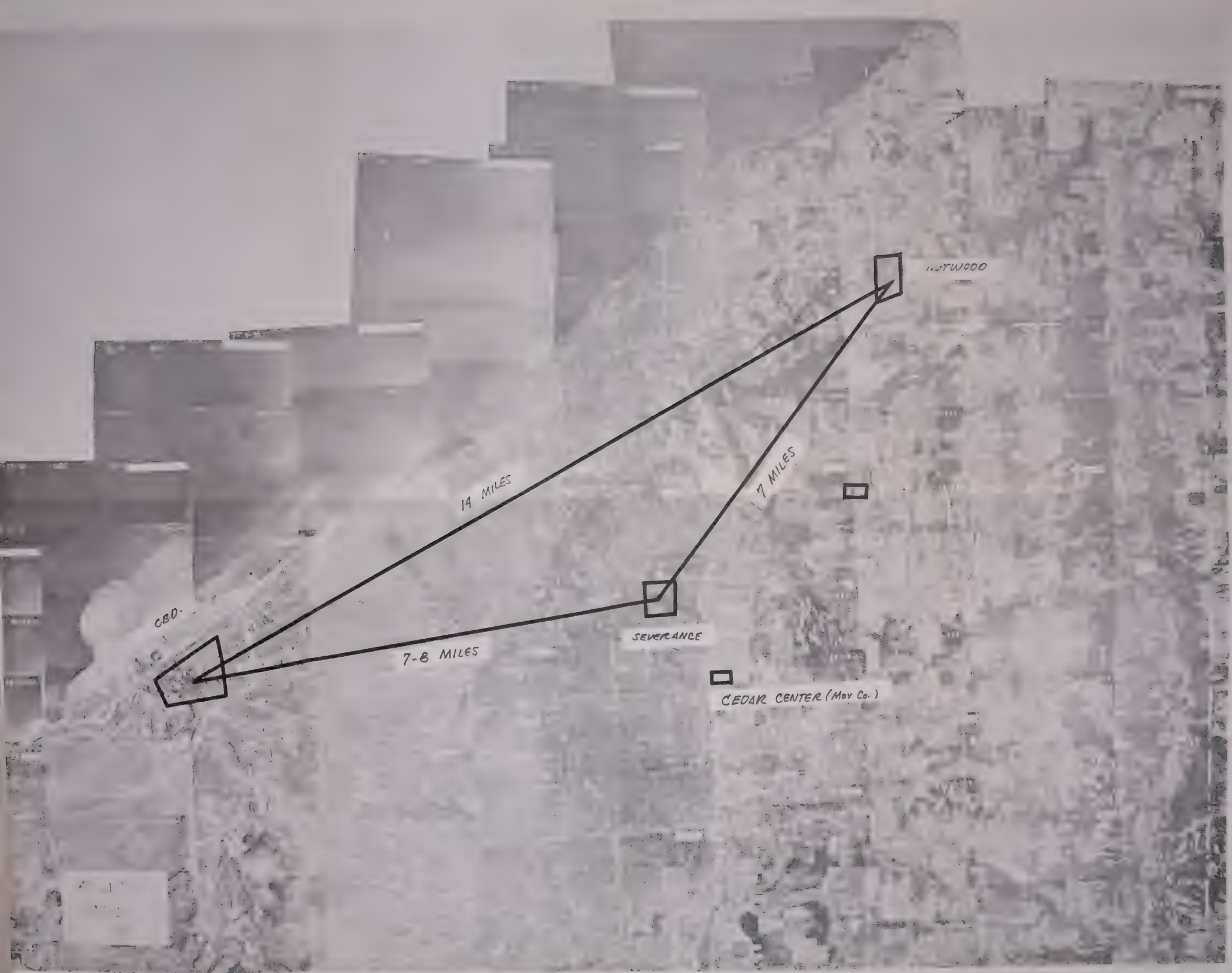
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OPENING BRIEF OF LARRY P. SMITH, ET AL.,  
AS APPELLANTS

---

INTRODUCTORY NOTE

The facts relevant to this appeal are few and almost entirely undisputed. Since the record is lengthly (2,234 pages of pleadings, 2,792 pages of reporter's transcript and 372 exhibits), we have filed with this brief an appendix which includes written memorandum decisions and oral opinions of the trial judge (App. 1-26), highlights in chronological sequence from the admitted facts section of the 370-page pretrial order (App. 26-88), ex-

cerpts from the testimony (App. 88-147), the full text of a key exhibit (App. 149-172), a table summarizing the evidence on one issue (App. 173-176), and a list of exhibits (App. 177-184). To identify sources, appendix references to memorandum decisions are designated (M.D., App. \_\_\_\_), to oral opinions (O.O., App. \_\_\_\_), to the admitted facts (A.F., App. \_\_\_\_), to the record (R., App. \_\_\_\_), and to the testimony (Tr., App. \_\_\_\_). Where not clear from the context, the names of the witnesses are given, e.g., (Jones Tr., App. \_\_\_\_).

## **JURISDICTIONAL STATEMENT**

Jurisdiction of the District Court was invoked under 15 U.S.C. § 15 as to the antitrust claim of the first amended complaint (Count 4) and under 28 U.S.C. § 1332 as to the remaining claims, by virtue of diversity and amount. This court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE CASE**

### **1. Nature of the Case and of this Appeal**

This action is by a real estate broker, Hilltop Realty, Inc., and its clients, Mesdames Powell and Ashcraft (often referred to herein as the sisters), against members of a real estate consulting firm, Larry Smith & Company, which furnished a report on the market potential for shopping center purposes of Nutwood Farms, a farm owned by the sisters and located in the eastern suburbs



of Cleveland. The conclusions of the report furnished by Smith in January, 1960 pursuant to its agreement with Hilltop indicated Smith's opinion that insufficient retail sales potential existed to justify major shopping center development. No retail development had been undertaken at Nutwood as of the date of trial, five years after the report was submitted. Hilltop, later joined by the sisters, filed an action, asserting four theories of recovery: (1) fraud, based on the fact that the consulting firm had not disclosed a potential proprietary interest in another property (Severance) seven miles southwest of Nutwood, (2) breach of contract, based on the assertion that the report was incorrect and negligently prepared, (3) violation of the Ohio antitrust laws by trying to prevent the development of a shopping center at Nutwood and (4) violation of the Sherman Act, through restraint of a development at Nutwood.

The locations of Nutwood, Severance, the May Company's Cedar Center and the Central Business District (CBD) of Cleveland are shown on an aerial photograph (Ex. 346), Plate 1 hereto.

The district judge dismissed claims (2), (3) and (4) and found in plaintiffs' favor on claim (1). Hence, the claim of fraud is the only one relevant to this appeal. One question presented here would, if resolved in our favor, make the other issues we raise academic. That is, whether the district judge's awards of compensatory

damages (\$5,840), punitive damages (\$75,000) and attorneys' fees (\$75,000) are consistent with other findings by the court that:

- (1) plaintiffs' charges that the conclusions of the report were wrong and that Nutwood was worth more than the sisters sold it for were unfounded. (O. O., App. 5-6, M.D. App. 10) and
- (2) defendants' motive in failing to disclose that they might buy an interest in Severance was not to overreach plaintiffs but to protect a confidence growing out of a pre-existing consulting relationship, which relationship was discussed fully with plaintiffs when Smith was retained by Hilltop (O. O., App. 2, 8-9, 15, M.D., App. 13).

In short, the threshold question is, can the trial court's finding of actual fraud stand when the court has found that the plaintiffs failed to prove the incorrectness of the report or that they suffered any damage in selling Nutwood. The trial court's rationale was that the report, while unassailable as to the conclusions expressed, was *legally* worthless because of failure to disclose. Hence, the court found that Hilltop and the sisters were each damaged in the amount paid (\$2,920) by Hilltop to Smith for the report. To that finding of compensatory damage, the court added punitive damages and attorneys' fees totalling \$150,000, on the theory that defendants' failure to disclose justified plaintiffs in bringing this lawsuit.

The basic question is answered concisely in Ohio Jurisprudence, "Neither fraud without damage nor dam-

age without fraud is sufficient to support an action” 24 O. Jur. 2d 634-635, Fraud & Deceit § 20.

A finding of compensatory damage is a *sine qua non* to recovery of punitive damages. Punitive damages are in turn, a *sine qua non* to recovery of attorneys’ fees. Therefore, if the award of compensatory damages is held to be erroneous, the several questions we raise concerning application of the Washington and Ohio rules as to punitive damages and attorneys’ fees become moot.

## 2. Resume of Pleadings and Proceedings

In January, 1963, Hilltop filed a complaint against some of the Smith partners, charging in four alternative claims, fraud, breach of contract, violation of the Ohio antitrust laws and violation of the Sherman Act (R. 1-14). Each claim was founded on allegations that the Smith firm had intentionally and maliciously produced a false report concerning the market potential of Nutwood Farms for regional shopping center purposes. Damages in the form of loss of real estate commissions were claimed by Hilltop because, it was asserted, Nutwood Farms was sold for less than its true value, in misplaced reliance on the false report.

In July, 1964, a first amended complaint was filed (R. 100-21). The sisters were joined as parties plaintiff, several additional Smith partners and corporate affiliates and Ray L. Treiger, the Smith employee who had been in charge of the Nutwood study, were added as de-

fendants, The Austin Company was added as a defendant as to the federal antitrust claim, and the prayer was increased from \$1,312,500.00 to \$8,862,500.00. This increase was on the assertion that Nutwood's real value had been \$20,000 an acre (R. 110) instead of \$6,000, as claimed in the original complaint (R. 6). Nutwood had been sold by the sisters to Ridge Hills Development Co. on April 29, 1960 for \$3,500 an acre (A.F., App. 78-79).

On April 7, 1965, the district judge entered orders (R. 948-55) dismissing both the federal and state antitrust claims on summary judgment. Since The Austin Company had been joined only as to the claimed federal antitrust violation, it was dismissed with prejudice (R. 948-49). By orders entered June 10, 1965, the court also dismissed on summary judgment defendants Winmar Holding Company, Inc., a Smith affiliate, and Ray L. Treiger (R. 1026-27).

### **Oral Opinions and Memorandum Decisions**

Immediately upon conclusion of the trial, which lasted twelve days, the court on August 6, 1965 expressed tentative opinions on the merits. Later, on October 29, 1965 and May 2, 1966, the court issued written memorandum decisions. The court did not enter findings apart from these two decisions. We have reproduced the two memorandum decisions verbatim and the essential parts of the tentative opinions and other observations of the court, as Part I of the Appendix filed with this brief.



## Judgment

The court entered judgment on the fraud cause of action, in favor of Hilltop, for \$2,920 compensatory damages and \$40,000 punitive damages, against defendants Larry P. Smith, Frederick C. Arpke, Frank A. Orrico, Ian McConnachie and James O. York, and in the sisters' favor for \$2,920 compensatory damages and \$35,000 punitive damages. It also granted recovery of \$75,000 to plaintiffs "as reasonable attorneys' fees" (R. 2149-50). It dismissed the remaining defendants.

It is from this judgment of May 13, 1966 that the present appeal was taken on May 13, 1966 (R. 2155-56). On June 13, 1966, plaintiffs cross appealed against all defendants, including The Austin Company (R. 2185-86).

### 3. Narrative of the Controversy:

Larry Smith & Company, a partnership, four of whose members and one of whose former members (Arpke) are the present appellants, is a real estate consulting firm which has as one specialty, feasibility studies on potential shopping center sites (L. Smith Tr. 2333-34). The methodology employed by Smith in making these studies was developed by Larry Smith, principal in the firm, after World War II (L. Smith Tr. 2340-48). Briefly stated, it involves development of statistical and economic information concerning an estimated "trade area" for a project site, determination of population levels past, present and future for that trade area, income levels for

trade area residents, retail expenditures made by trade area residents, and evaluation, by use of established yardsticks, of the effective competition to the proposed project. From this data, the Smith firm draws conclusions as to the possibility of developing a retail center at the site studied (Kelly Tr. 2130-32). As of the time it undertook the Nutwood analysis in December, 1959, the Smith firm had as partners Larry Smith, Frank Orrico and Frederick Arpke (A.F. App. 25-29). As of that time the firm had made between fifteen hundred and twenty-five hundred such studies (L. Smith Tr. 2336). It maintained offices in Seattle, Washington, D. C., New York, Chicago and elsewhere (A.F. App. 25). It had made analyses throughout the United States and various foreign countries (L. Smith Tr. 2336, Kelly Tr. 2125), principally for department stores and real estate developers. Department stores served by Smith include R. H. Macy, J. C. Penney, Gimbels, Strawbridge & Clothier of Philadelphia, J. L. Hudson of Detroit, Carson, Pirie & Scott of Chicago, Meier & Frank of Portland, Bullocks of Los Angeles, Montgomery Ward, Eatons of Canada, The Dayton Company of Minneapolis, The Myer Emporium of Melbourne, Australia, and many more (L. Smith Tr. 2335, Kelly Tr. 2125). It had also made land use or feasibility studies for insurance companies, banks and governmental agencies, such as the cities of Vancouver, B. C., Sacramento, Anchorage, Philadelphia, Baltimore, New Haven, Hartford, Boston, Detroit, Pittsburgh, Fort Worth and many

others (L. Smith Tr. 2332).

In 1959-1960 Smith was organized in two divisions, the Western Division with headquarters in Seattle, which was also the home office, and the Eastern Division with headquarters in Washington, D. C. (L. Smith Tr. 2333). All three partners lived in the Seattle area.

In charge of the Eastern Division was Harold R. Imus, then a senior associate (Imus Tr. 727). Under Imus were several account executives, a number of analysts or report writers, and various statistical clerks, field men and other supporting personnel (Steinberg Tr. 560).

Under date of September 14, 1959, Henry Petti, president of Hilltop, wrote to Smith's New York office asking for a quotation of fee to do a study of the Nutwood Farms site about 15 miles east of downtown Cleveland (A.F., App. 43). The inquiry was referred to the Washington, D. C. office. Imus in turn referred it to Ray L. Treiger, one of his account executives who had familiarity with Cleveland through work on a property known as Longwood or Severance, in Cleveland Heights. Treiger had worked since 1955 on studies of the property for The Austin Company, which had bought the property from Severance Millikin (A.F., App. 31-32). Treiger acknowledged Petti's inquiry by telephone and on September 24 wrote a memo to Ake Orndahl, manager of Smith's New York City office, in which he said in part:

"I told Petti we were working on the Longwood [Severance] property and felt that there might be some conflict in our own position. He said that he did not think that there would be because he did not think that his property would pull very far from the west. He said he might pull 20 miles from the east, but if it went two miles to the west, he'd be lucky" (A.F., App. 44).

Severance is about seven miles southwest of Nutwood (A.F., App. 28). See Plate 1 of this brief.

Treiger ended his memo,

"I am not sure I know how to handle this, in view of our possible investment position, and since this is your realm, I'd like to get your opinion on it" (A.F., App. 45).

At that time Orndahl was involved in negotiations looking to the possible purchase by the Smith firm of an interest in Severance Center (Orndahl Tr. 1119), a proposed shopping center in which The Higbee Company and Halle Brothers Company, two of the three leading Cleveland department stores, were publicly committed to build branches (A.F., App. 37-38).

On September 30, Treiger wrote a memorandum in part as follows concerning Hilltop's letter:

"After speaking to Ake [Orndahl] on the 29th, I agreed that we ought to try and handle this inquiry. I spoke to Mr. Petti and told him that as long as he recognized the fact that we have been acting on the Severance Estate for some three years, we believed we could act for him . . ." (A.F., App. 46).

On the same day, September 30, Treiger wrote Hilltop



a letter proposal to make a "Shopping Center Analysis" of Nutwood for \$4,500 (A.F., App. 45-46).

On October 5, in a telephone call from Treiger, Petti asked Treiger to come to Cleveland for a personal interview (A.F., App. 46-47). That interview, which was the only personal contact between the parties before Smith was retained and rendered its report, took place in Cleveland on October 8, 1959. Both Treiger and Wilbert O'Neill, attorney and business advisor for the sisters, wrote memoranda of the meeting (Treiger, A.F., App. 47; O'Neill, A.F., App. 47-49). The two memos are not in conflict as to what occurred. The part of O'Neill's memo which is relevant to the issue of disclosure follows:

"I met yesterday with Messrs. Petti, Crume [secretary of Hilltop] and Ray L. Treiger, who represents Larry Smith & Co., real estate consultants of Washington, D. C. The meeting had been arranged by Mr. Petti with Mr. Treiger to discuss a proposal by Larry Smith & Co. for a survey to determine the availability of Nutwood as a site for a regional shopping center development.

"Petti showed me proposals he had received from two other such consultants but the Smith proposal seemed most interesting, notwithstanding the fact that Smith & Co. had acted as consultants on whose advice at least partly the decision had been made by Higbee's and Halle's to go into the Longwood [Severance] development at Mayfield and Taylor Roads. Treiger told us that his company had become advisers on this Longwood project for the Austin Company and Severance Millikin, after the Longwood area had been zoned for retail development but with an exclusion of any super-market. The area of course has since been re-zoned to permit a super-

market development and after extensive litigation it was considered that it was legally possible now to go ahead with the Longwood development project. Treiger emphasized the possible conflict of interest between his firm's loyalty to Austin and Severance and any recommendations he might make to the promoters of the Nutwood project. I called Petti's attention to the fact that this loyalty to Austin and Severance might reasonably be expected to prevent Smith & Co. from making any recommendations or using other influence to induce Higbee, Halle or any other prospective tenant to go into a Nutwood development if that would interfere with their commitments to the Longwood project, but it was considered worth while to get Smith's survey and recommendations, having in mind that his work on the Longwood project had given him a great deal of background information, which would be useful on other phases of the project besides the matter of department store tenancies" (A.F., App. 47-49).

At the time of the October 8 visit, plaintiffs were negotiating with Edward J. DeBartolo, reputed by Petti to be the developer-owner of thirty shopping centers in northeast Ohio and Pennsylvania (Ex. 371, pp. 126-27; see A.F., App. 49). When these negotiations came to naught, Hilltop turned back to Smith's proposal and, on December 5, 1959, Petti hired Smith to study Nutwood (A.F., App. 53).

On December 11, 1959, John Marshall, economic analyst in the Washington office assigned to prepare the Nutwood analysis, issued field instructions to Tom Darmstadter, who was to do the field work for the report (A.F., App. 54-55). On December 22, upon returning from Cleveland, Darmstadter wrote a detailed memorandum to

Marshall (A.F., App. 55-58).

On January 4, Treiger informed Petti by phone that the Smith findings on Nutwood were negative. Treiger suggested that further refinement of details could not affect the general conclusions and suggested that Smith send Hilltop a memorandum explaining the conclusions, without writing a finished report. Petti concurred in this suggestion (A.F., App. 59).

On January 8, Smith mailed to Hilltop a written memorandum entitled "Shopping Center Opportunities at Nutwood Farms" (A.F., App. 59), in which Smith concluded that the effective competition was such that there was insufficient opportunity for a regional or intermediate shopping center at Nutwood, at least through 1970 (Ex. 29). The full text of this memorandum is printed in the appendix to this brief (App. 149-72). In view of the reduction of Smith's commitment from a full report to a memorandum, Smith reduced its fee from the agreed \$4,500 to \$2,920 (Ex. 7; See Ex. 29, App. 152).

Neither of the two key men assigned by Smith to the Nutwood study, John Marshall and Tom Darmstadter, knew until many months after the report was delivered to Hilltop that Smith had any idea of negotiating for a proprietary interest in Severance (Marshall Tr., App. 92; Darmstadter Tr., App. 95). Both Marshall and Darmstadter testified that the judgments exercised by them were not influenced in any way by their superiors

(Marshall Tr., App. 90; Darmstadter Tr., App. 94-95). Marshall testified that he reviewed his findings separately with Treiger and Imus, who suggested some very minor modifications (Tr., App. 90-92). Treiger, Marshall remembered, altered individual per capita expenditure patterns slightly, some up and some down, and made a slight downward revision of the effective competition Nutwood might expect from a given location because, "I was a little more fearful of competition than Mr. Treiger was" (Tr., App. 91).

At the time of trial, Marshall, who had a master's degree, held a position of price economist with the Bureau of Labor Statistics (Tr., App. 88) and Darmstadter was vice president in charge of the Property Management Division of The Lumberman's Company of Austin, Texas, a real estate development firm operating on a national basis (Tr., App. 92-93).

Hilltop's contacts with Larry Smith & Company were all through Ray Treiger, although certain other Smith employees, notably Imus, Marshall and Darmstadter, were involved. None of the then partners, Larry Smith, Frank Orrico and Frederick Arpke, was aware that the Nutwood analysis was being performed. Larry Smith first heard of Hilltop and Nutwood in late 1961 or 1962 (Tr., App. 133-35), Orrico sometime after the fall of 1960 (Tr., App. 138), and Arpke first heard of them "when litigation was threatened" (Tr., App. 145).



Following delivery of the Nutwood memorandum, Treiger went to Cleveland on January 18, 1960 and spent the afternoon with Petti and O'Neill, discussing alternative possibilities for development of the property. Treiger made a complete written memo of the meeting (A.F., App. 59-60) as, again, did O'Neill, in the form of a letter to the sisters dated January 22, 1960 (A.F., App. 64-69). As with the previous meeting of October 8, 1959, the memos of Treiger and O'Neill are not in conflict.

On January 13, 1960, the owners of Nutwood had received an offer, through Hilltop, of \$3,500 an acre for the property from Harry Ratner, a Cleveland developer (A.F., App. 59). Treiger was not informed about this offer on the occasion of his visit five days later with Petti and O'Neill. Nor does the record show that Smith was ever asked any advice as to whether the owners should sell Nutwood, or for what price.

### **The Issue of Reliance As It May Affect This Appeal**

In view of the district judge's findings that Smith's negative conclusions had not been proven incorrect and that plaintiffs had shown no damages in the sale of Nutwood, plaintiff's reliance or non-reliance on the report would not appear to be a live issue on this appeal (M.D., App. 10).

Absent a finding that plaintiffs' reliance on the report somehow damaged them, the issue of whether plaintiffs relied on the report or, for that matter, on Smith's non-

disclosure at the time Smith was employed, has no practical significance. Nevertheless, since the district judge, after "vacillation", found that Hilltop relied on the analysis in selling to Ridge Hills, we feel obliged to review the evidence on this score. It is not in serious conflict. It consists of Petti's own testimony, his letter to a Cleveland real estate firm, following receipt of the Smith memorandum, and the independent testimony of Karl Kammer, who acted as attorney for Ridge Hills. In sum, it shows that Petti relied upon the affirmative findings of Smith and rejected Smith's negative findings, in selling to Ridge Hills. As for the sisters, Mrs. Ashcraft, who was in Madrid and never read the report, relied on O'Neill and Petti (Tr., App. 126-27), and Mrs. Powell, who was in the Virgin Islands and never read the report, relied on Mrs. Ashcraft and O'Neill (Tr., App. 128). If O'Neill in turn relied on the report it was through Petti (See O'Neill, Tr. 1868-69). Therefore, the pivotal question as to all plaintiffs is whether Petti relied.

### **1. Petti's Testimony**

Petti testified that he relied upon the Smith analysis only to the extent that it was favorable to Nutwood:

"Q. (By Mr. White) Is it your testimony then, Mr. Petti, that you relied on the Smith report to the extent that it was favorable, namely, such aspects as good access, but did not rely on the negative aspect that there was too much competition?

"A. I think that was precisely my conclusion as to

the report." (Tr., App. 114; also see Tr., App. 112).

As to competition, Petti stated that he believed Nutwood had none of any consequence:

"Q. . . . Did you believe at that time that Nutwood had no significant competition of a regional nature?"

. . .

"A. Yes. I did believe that it had no significant competition as a true regional site." (Tr., App. 115).

Petti represented Nutwood to a prospect as a good retail site on the heels of Treiger's visit to Cleveland on January 18, 1960 (Tr., App. 108). On a further occasion when he met with another prospective purchaser and real estate agent on January 25, 1960, two weeks after receiving the Smith report, Petti testified that he had agreed with them that Nutwood had great potential as a regional shopping center (Tr., App. 111).

## **2. Letters to Calvin & Cloak — Exhibits 348A & B**

Before retaining Smith, Hilltop had compiled considerable data concerning what it conceived to be the Nutwood trade area (Petti Tr. 254). This material was sent to real estate firms, developers, department stores and anyone who might be interested in the site (See Chart, Appendix Part V). Among those who received letters was Donald Cloak of the Ostendorf-Morris Company, realtors in Cleveland. Petti wrote to Cloak on June 12,

1959, giving his standard sales pitch on Nutwood (Ex. 348B). On January 29, 1960, just eleven days after Treiger's trip to Cleveland to review with Petti Smith's memorandum on Nutwood, Petti wrote to Peter Galvin, another officer of Ostendorf-Morris (Ex. 348A).

Petti failed to produce either of the letters to Ostendorf-Morris (Exhibits 348A and 348B) in the extensive pretrial proceedings, despite the fact that they fell squarely within the subpoena duces tecum served on him for his deposition (Exhibit 363). Petti testified he understood he was to bring all such letters to his deposition (Tr. 272-73). It was only through the accident that defendants retained Edwin Smith, another officer of Ostendorf-Morris, as an expert witness on value, that the letters ever came to light. The two letters are, in our view, conclusive on the issue of reliance on the Smith analysis. We have, therefore, reproduced them on the following pages with a few added comments. It will be seen that Petti sang exactly the same tune about the great retail potential of Nutwood eleven days after receiving Smith's report as he had in June, 1959, three months before his initial contact with Smith. In addition, several new verses had been added. These Petti had copied from the affirmative findings of the Smith memorandum. It was a sales tool he had not had in June, 1959. Of course, he omitted any reference to Smith's negative conclusions. For example, the second, third and fourth paragraphs of the January letter are lifted from

plates  
crosses Disbar Road (Route 94), thus creating two interchanges at  
either end of the subject property.

It is to be noted that the state actually will be acquiring 30 to 40 acres of the subject property. We understand that appraisals in the area are now getting underway.

Mr. Peter Galvin  
Page 2  
January 29, 1960

2. Nutwood is good for 1,000,000 square feet of retailing.

3. Petti says Nutwood is unique site for regional retail center, before and after Smith report.

1. The Site. The plan demonstrates that the site can accommodate upwards of 1,000,000 square feet of retail building with parking for more than 6,500 cars. Nutwood might well support additional competitive development in the form of a hotel or motel, office building, apartments and entertainment facilities such as a supper club, bowling alleys, legitimate theater or music hall, plus a couple of three service stations.

2. Location. Nutwood enjoys a unique location for the development of a major retail center. It is adjacent to or in close proximity to principal existing traffic arteries. It will be adjacent to the Euclid Spur which will connect the North-South Thruway with the Lakeland Freeway. According to Albert Porter, Cuyahoga County Engineer, it is expected that most of the traffic from the east will enter Cleveland over the Spur. The Spur and Lakeland Freeway will provide the easiest access to downtown Cleveland for people in the Hillcrest and eastern areas, thus tending to develop the habit of a northerly movement of these people as opposed to a westerly or southerly movement. Richmond Heights and Highland Heights are anticipating increase in residential development when sanitary sewer facilities become available in them within the next couple of years. Residential development in western Lake and Geauga Counties is expected to continue. It is our considered opinion that this is the only location in the northeast area that is suitable for a regional center. If true, and we know of no other, this should provide insurance against significant competition of a regional nature.

3. Trading Area. The total retail spending by trade area residents is substantial. In view of the distance of the trade area from downtown Cleveland (13 miles), it can be expected that very substantial purchases of total spending will be retained by local facilities (as opposed to facilities in downtown Cleveland). Thus the potential for suburban facilities is very significant.

In the immediate area surrounding Nutwood there are now well advanced plans for an industrial park and multi-million dollar apartment projects. With the new residential development which is almost certain to come nearby, Nutwood might well become the hub of a market area approaching 400,000 permanent residents and transients. Developed to its greatest potential it could become essentially a "downtown" location yet serve and maintain the character of suburbia. Such a complex we believe to be consistent with new growth in expanding metropolitan areas. Much, of course, would depend on the nature of the architecture and on a well conceived plan designed to build in the intangibles which would make a visit to Nutwood an adventure, not only in shopping but also in living, an element of downtown which we overlook entirely or tend to minimize.

Mr. Peter Galvin  
Page 3  
January 29, 1960

Our investigation indicates that all aspects of the subject lands are favorable to such a development. The topography provides good gradients and natural drainage. The soil formations are suitable for sound low cost foundations and excavations. Power, sewer and water are available close by.

We have in our possession, as of this writing, a market analysis by Larry Smith and Company, compiled in the last several months, plus a utilities study by the Frank A. Thomas and Associates, Engineers, for the City of Euclid, City of Wickliffe and Village of Willoughby Hills. If your clients are interested in this property, we are in a position to make this information available to them.

The sale price at this time for the entire property, including land to be acquired by the state, (10 acres of which front on Euclid Avenue presently agreed to support 180 apartment units), is \$3,750 per acre. It is our opinion that a sale can be completed with approximately 25% down (\$185,000) and the balance to 4 or 5 equal installments. July land to be acquired by the state of Ohio would be released on the initial down deposit. Suitable release terms for construction purposes can be arranged for the balance. Money obtained from the state can be applied against the purchase price.

We are of the firm belief that all of the above strongly suggests that the time is here for someone to act in order to capitalize on an opportunity while it is still available.

Very truly yours,

HILLTOP REALTY, INC.

Henry Petti  
President

HP:rmf  
enc  
cc: W. Savage

Mr. Donald Cloak

Page 2

present no true regional shopping center and no major department store located in the northeast section of Greater Cleveland.

3. Location. Nutwood enjoys a unique location for the development of a major retail center. It is adjacent to or in close proximity to principle existing traffic arteries. It will be adjacent to the Euclid Spur which will connect the North-South Thruway with the Lakeland Freeway. According to Albert Porter, Cuyahoga County Engineer, it is expected that most of the traffic from the east will enter Cleveland over the Spur. The Spur and Lakeland Freeway will provide the easiest access to downtown Cleveland for people in the Hillcrest and eastern areas, thus tending to develop the habit of a northerly movement of these people as opposed to a westerly or southerly movement. Power, water and sewer facilities are available close by. Richmond Heights and Highland Heights are anticipating an unprecedented increase in residential development when sanitary sewer facilities become available in them within the next three years. Residential development in western Lake and Geauga Counties is expected to continue. It is our considered opinion that this is the only location in the northeast area that is suitable for a regional center. If true, and we know of no other, this should provide insurance against significant competition of a regional nature. At the same time, it strongly suggests that we should act in order to capitalize on an opportunity while it is still available.

4. Composition of Center. As established above, the area should support in the neighborhood of 1,000,000 square feet of stores made up as follows:

a. Two department stores containing 400,000 to 500,000 square feet. This should include a store such as Sears with one such as Taylor's or Sterling-Lindner's. Ideally one of these stores would anchor the center of either end.

b. An additional 400,000 to 500,000 square feet of complimentary facilities consisting of specialty stores, service shops and a limited number of convenience stores. These tenants should be financially sound and experienced merchandisers of proven capabilities -- preferably national or strong local chains.

As you are aware, the above is the result of thorough preliminary investigation. The figures and conclusions are derived from factual information, general experience and rule-of-thumb methods. Such methods have proven remarkably accurate in the past, and we are

Mr. Donald Cloak

Page 3

confident that detailed studies, when completed, will produce equally as encouraging results. We have here a combination of circumstances that provide extremely favorable conditions for a most successful development.

Hope all of the above will bring you up-to-date and help you evaluate the great potential of our Nutwood Development, and, as I made known to you in your office, we would prefer to stay with the development and would be receptive to a joint venture with your company.

Kindest regards, I remain,

Very truly yours,

HILLTOP REALTY, INC.

Henry Petti  
President

hp:rmf  
enc

Petti uses Smith report, copies from page 1 of Ex. 29.

4. Petti relies on own "investigation", Not on Ex. 29!

Nutwood asking price was increased from \$3,500 to \$3,750 an acre after Smith report.



3 weeks after Petti received Smith Report, Ex. 29.

January 29, 1960

Mr. Peter Galvin  
c/o Ostendorf-Morris Co  
33 Public Square  
Cleveland, 15, Ohio

Dear Pete

1. Petti says Nutwood is still a major retail center, despite Smith report.

Copied directly from Smith report, Ex. 29, page 1. Petti uses Ex. 29 as sales tool.

I am enclosing for your information an area map and site plan, also a brief summary which we believe to represent the existing conditions and the collective thinking that has developed in the use of Nutwood farm development for a major retail center.

The subject property, as indicated on the map, consists of approximately 17 1/2 acres situated on the southwest corner of Chardon Road (U S Highway 6) and Bishop Road (Ohio State Highway 84) in Lake County, about three miles east of the city limits of Cleveland. Actually, the Cuyahoga County line borders this property on the West.

This Nutwood Farm site is located adjacent to the proposed Euclid spur connecting Ohio State Route 1 (North-South Freeway) with the Lakeland Freeway. These two freeways have not been constructed to date, but it is estimated by the Ohio State Highway Department that the Euclid spur would be open to traffic by the end of 1962.

Access to the site may be considered to be excellent. The property will have frontage on the three highways mentioned above (Routes 6 and 84 and the spur connecting the two freeways), plus excellent access from Euclid Avenue (U S 20), a major six-lane artery, via the Euclid spur. The highway department has indicated plans for a four-ramp cloverleaf at the point where the Euclid spur crosses Bishop Road (Route 84), thus creating two interchanges on either end of the subject property.

It is to be noted that the state actually will be acquiring 30 to 40 acres of the subject property. We understand that appraisals in the area are now getting underway.

Mr. Peter Galvin  
Page 2  
January 21, 1963

2. Nutwood is good for 1,000,000 square feet of retailing.

1. The Site. The plan demonstrates that the site can accommodate upwards of 1,000,000 square feet of retail building with parking for more than 8,500 cars. Nutwood might well support additional compatible development in the form of a hotel or motel, office building, apartments

3 months before Petti made initial contact with Smith.

HILLTOP 8-0700

**Hilltop**  
Realty Inc.

LYNDHURST 2A, OHIO  
June 12, 1959

CAUSE 5762  
PENDING REPLY 347 (B)  
JUL 22 1963  
ADMITTED

Mr. Donald Cloak,  
Ostendorf-Morris Company,  
33 Public Square,  
Cleveland, Ohio

Dear Don:

I am enclosing as per your request, an area map, site plan and isochron chart, also a brief summary which we believe to represent the existing conditions and the collective thinking that has developed in the use of Nutwood Farm development for a major retail center.

1. The Site. The plan demonstrates that the site can accommodate upwards of 1,000,000 square feet of retail building with parking for more than 8,500 cars. Nutwood might well support additional compatible development in the form of a hotel or motel, office building, apartments, and entertainment facilities such as a supper club, bowling alleys, and a legitimate theater or music hall.

2. The Market. The isochron chart shows the area lying within 15 minutes driving time of the proposed center. Actually, the primary market area of this center will extend at least 30 minutes to the east, if not as far to the south and west. Within slightly more than 15 minutes distance there was in 1956 about 99,000 family units. It is estimated that this figure will increase to approximately 130,000 during the 1965-70 period. Based on average per family retail purchases of about \$4700 for Cuyahoga County and \$3900 for Lake County, a market of from \$350,000,000 to \$450,000,000 would seem to be indicated. The amount of this market that is presently being served by existing retail outlets has not yet been determined. However, to capture only a modest percentage of this potential would result in substantial volume.

These, of course, are estimates derived from preliminary study. But, by its regional nature, this center will draw trade for shopping goods from well beyond the 15 minutes limit, and thereby tap a potential that has not been considered in the above figures. Therefore, we believe these figures to be conservative. Furthermore, there is at

Mr. Donald Cloak

Page 2

present no true regional shopping center and no major department store located in the northeast section of Greater Cleveland.

3. Location. Nutwood enjoys a unique location for the development of a major retail center. It is adjacent to or in close proximity to principle existing traffic arteries. It will be adjacent to the Euclid

the Smith memorandum (App. 154). So is the first paragraph under "Trading Area" (App. 154). The second paragraph under "Trading Area" is taken from earlier letters by Petti to retailers. For example, see the next to the last paragraph of Petti's letter to a prospect dated November 22, 1958, where he said that the "intangibles" would make "a visit to Nutwood an adventure not only in shopping but in living" (Ex. 371, p. 57).

Exhibits 348A and 348B give the lie so directly to plaintiffs' basic position that they relied on the Smith report that Petti had ample motive to suppress them. The incident casts a dark shadow on Petti's integrity but, far more important, it erases any possible problem in choosing between the testimony of Petti and Karl Kammer as to the Ridge Hills negotiations.

### **3. Testimony of Karl Kammer**

Karl Kammer, a Cleveland attorney, was an officer and general counsel of Ridge Hills since its inception. The two principals in Ridge Hills, Harry Ratner and Fred Stark, were both deceased at the time of trial (Petti Tr., App. 104; Kammer Tr. 1636-1637). Kammer testified that Ridge Hills' negotiations with Petti for Nutwood had commenced "for at least a period of several weeks, perhaps a few months" before January 13, 1960, the date of Harry Ratner's original offer (Tr., App. 119). Petti told the Ridge Hills people, who were, according to Petti's earlier false testimony, only interested in the

property for residential purposes (Petti Tr. 378), of the tremendous potential of the property as "one of the finest areas in perhaps the State of Ohio for a shopping center" (Tr., App. 119).

Kammer met with Petti "three or four times" between January 13 and April 29, 1960 (Tr., App. 121). Petti continued to make the same statements as to the potential of Nutwood that he had made prior to January 13 (Tr., App. 120-21). Petti during these meetings proposed that he become the leasing agent for the new owners in obtaining "department stores and other leases of a major nature" (Tr., App. 121).

Ridge Hills at all times between January 13 and April 29 informed Petti that it intended to "put Nutwood to use as a regional complex consisting of a major shopping center of the regional type . . ." (Tr., App. 121-22). Petti never, at any time, in Kammer's presence, expressed any doubt with respect to the use of Nutwood for a regional shopping center (Tr., App. 122).

Petti acted for the new owners in promoting Nutwood as a regional shopping center "from the inception of our negotiations through that period of time that he was given an exclusive." (Tr., App. 123). This would, of course, embrace the period before, during, and after the Smith analysis, until the expiration of Hilltop's exclusive agency on April 27, 1962 (A. F., App. 87). On cross examination, Kammer repeated that the negotiations with Ridge Hills which led to the sale commenced several

weeks before January 13, 1960 and, therefore, several weeks before the Smith study was furnished to Hilltop (Tr., App. 119). Plaintiffs did not cross examine Kammer at all concerning the representations made by Petti.

As was true during his efforts to interest retailers in Nutwood for the two years before the Ridge Hills sale, Petti found in his efforts for the two years following the sale that no one was interested in Nutwood (Tr. 436).

### **Smith's Relationship to Severance**

Severance Millikin owned a 151-acre residential estate, "Longwood," located in Cleveland Heights, in the middle of a densely populated and prosperous area some seven or eight straight line miles east of downtown Cleveland (A.F., App. 28, 30; Walton Tr. 2066-67). This property later became known as "Severance." In 1954, Millikin employed The Austin Company, a large firm of builders with headquarters in Cleveland, to have the property rezoned. The property was rezoned for development as a shopping center on December 20, 1954. A taxpayer's action was brought attacking the rezoning. Rezoning was finally upheld on December 18, 1957 by the Supreme Court of Ohio (A.F., App. 30). After the 1954 rezoning, Millikin indicated that he desired Austin to carry out the development of the property (A.F., App. 17). Title to Severance was transferred to a corporation in which Austin held a 75% interest and Millikin 25% (A.F., App. 31-32).

In May, 1955 Austin employed Smith on a monthly retainer basis as its consultant in connection with Severance. Smith prepared a number of economic analyses which expressed its opinion that the site was well adapted to the development of a large regional shopping center (A.F., App. 31).

In May, 1958 the directors of Austin resolved not to develop Severance as a shopping center for Austin's account, due to lack of personnel familiar with that business. Accordingly, Austin decided to sell and asked Smith to help in obtaining a buyer for Austin's interest (A.F., App. 33).

In December, 1958, Smith began considering the possibility of itself joining in the purchase of an interest in Severance, and in January, 1959 began exploring the possibility of financing such a venture (A.F., App. 37).

On February 22, 1959, the Cleveland papers announced that Halle Bros. Co. and The Higbee Co., two of the three leading department stores in Cleveland, would build branches at Severance, and were negotiating contracts to this end with Austin (A.F., App. 37-38). The May Company, the third such store, had in 1958 opened a branch at Cedar Center, 1.5 miles from Severance (Kelly Tr. 2173), the largest branch store in Eastern Cleveland (Ex. 29, App., 160; see Plate 1 to this brief).

As of July 31, 1959, the retainer relationship between Smith and Austin was terminated. Austin and Smith were



then engaged in active negotiations for the sale of Severance to Smith. Austin advised Smith that if Smith did not become the purchaser of Severance it would be compensated for its services after July 31, 1959 (A.F., App. 42-43, 51).

From the outset of negotiations to the closing of the sale in July, 1960, Austin required that discussions on the sale of Severance be kept confidential (Ex. 274, p. 16-18, numbered from back of file; R. 1180; Ex. 84; Ex. 97, p. 10, numbered from back of file).

On February 10, 1960 Smith and Austin executed an agreement which, in effect, gave Smith an option to purchase Severance. This agreement provided that all publicity be subject to Austin approval until there should be a final closing (Ex. 77, p. 6).

On March 4, 1960, Lambert & Company, whom Smith had hoped would finance and participate in the transaction, informed Smith that it was not interested in the Severance project (A.F., App. 77).

Financing was finally arranged through another source and the corporate documents of Severance Estate, Inc. were delivered to Smith on July 21, 1960 (Ex. 282). Accordingly, a news release was issued to the Cleveland newspapers, which was printed on July 21, 1960 (Ex. 323). On that date an article appeared in the Cleveland Plain Dealer announcing the start of the Severance Shop-

ping Center and mentioning that Smith was owner and developer of the Center. (A.F., App. 79).

### **Further Meetings of the Parties Re Smith's Relationship to Severance**

On August 2, 1960, Petti sent a letter which had been drafted by O'Neill, to Smith, attention of Ray L. Treiger, in which, referring to the public announcement of Smith's interest in Severance, stated that it was causing "real embarrassment with my clients," asking for "a full explanation of your position" (A.F., App. 79-80). In response, Treiger went to Cleveland and had dinner with Petti and O'Neill on either August 10 or August 12 (A.F., App. 84-85; O'Neill Tr., App. 129). Petti had in the interim learned that Smith had been negotiating on Severance when it was retained by Hilltop. Petti complained of this fact to O'Neill on the way to meet Treiger at the Sheraton-Cleveland Hotel, and complained to Treiger of this fact when they met that evening (O'Neill Tr., App. 129-30). At the dinner meeting Treiger stated Smith's position and left Petti and O'Neill with a written summary of it (A.F., App. 80-85). Basically, that position was that Smith had made in 1959 a full disclosure of its existing relationship to Severance and "that we were still actively working on the project" (A.F., App. 81). Treiger's disclosure of the continuing consulting relationship to Severance was confirmed by the testimony of Crume, secretary of Hilltop (Tr., App. 96). At the dinner meet-

ing, Treiger defended the objectivity and accuracy of the Nutwood report and, in the memorandum left with Petti and O'Neill, wrote:

"Our responsibility to a client, particularly under a long-term consulting relationship, cannot be less than it would be to ourselves under a proprietary interest." (A.F., App. 81).

On September 17, 1960, Petti again wrote to Treiger, asking for answers to various questions regarding the chronology of the relationship between Smith and Austin (A.F., App. 85-86). On October 20, 1960, general counsel for Hilltop wrote a follow-up letter to Treiger (A.F., App. 86-87).

In view of Hilltop's questions, Imus and Treiger decided to investigate the adequacy of the original study (A.F., R. 1252). This review study was assigned to Everett Steichen, a senior associate who had not participated in any manner in the original study (Tr. 2044).

On February 15, 1961, Herbert Spring, Smith's Cleveland attorney, called a meeting in his office with O'Neill and Petti, Marvin Zelman, general counsel for Hilltop, and Steichen. At this time plaintiffs' representatives were given the "Review Memorandum" of Nutwood (Ex. 10) which had been prepared under Steichen (A.F., App. 87). O'Neill testified concerning this meeting as to Smith's attorney's responses to questions about the Smith-Austin relationship that Spring had responded fully and frankly (Tr. 2666-67).

Neither Smith nor its lawyers heard again from plaintiffs or their lawyers for almost two years. Then, on January 4, 1963, almost three years to the day after the Nutwood report was delivered, Hilltop commenced this action.

### SPECIFICATION OF ERRORS<sup>o</sup>

1. The court erred in finding that plaintiffs had proved all elements of a cause of action for actual fraud, including intent to deceive, materiality, reliance and damage (M.D., App. 10-12).

2. The court erred in awarding compensatory damages to plaintiffs (M.D., App. 12, 16, 25).

3. The court erred in measuring compensatory damages as though the action were one for rescission (M.D., App. 12, 16, 25).

4. The court erred in finding that Hilltop was obligated to provide a market report to Mesdames Ashcraft and Powell (M.D., App. 12, 17).

5. The court erred in assessing punitive damages in this diversity action:

(a) A Washington judge would refuse to apply Ohio law, which permits punitive damages, in the face of

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<sup>o</sup>The findings to which the specification of errors is directed are italicized in the memorandum decisions reprinted in the Appendix hereto, with notation as to the specification numbers.

the Washington public policy forbidding such awards.

(b) Even assuming Washington would apply Ohio law, under the law of that state imposition of punitive damages would not be justified. The court's characterization of defendants' non-disclosure as "gross fraud" is in any event clearly erroneous and inconsistent with the facts found by it (M.D., App. 12, 22, 25).

6. The court erred in holding that nominal damages will support an award of punitive damages, under Ohio law (M.D., App. 13).

7. The court erred in awarding punitive damages and attorneys' fees to plaintiffs in the absence of proof of actual malice, a requirement under Ohio law (M.D., App. 12, 22).

8. The court erred in concluding that under Ohio law punitive damages need not bear any reasonable relationship to compensatory damages (M.D., App. 23).

9. The court erred in finding that plaintiffs were justified in bringing this action because of defendants' failure to disclose facts to plaintiffs before suit (M.D., App. 14, 17).

10. The court erred in concluding that in light of its finding that plaintiffs were justified in commencing this action, they should be awarded their costs of litigation, as punitive damages, together with reasonable attorneys'



fees, and in making such awards (M.D., App. 14, 17, 25, 26).

11. The court erred in finding that one or more of the present appellants was aware of the nondisclosure or of Treiger's August, 1960 meeting with plaintiffs (M.D., App. 13).

12. The court erred in finding that any of the present appellants authorized or ratified the non-disclosure or that any of them are liable for punitive damages on a theory of *respondeat superior* (M.D., App. 13).

## SUMMARY OF ARGUMENT

### Specification of Error No. 1

The court concluded "that all eight elements of [actual] fraud under Ohio law have been proven by clear, cogent and convincing evidence" (M.D., App. 12). This conclusion is incompatible with the facts found by the court and is contrary to undisputed evidence, including admissions of the plaintiffs. Four elements of actual fraud were lacking, namely, intent to deceive, materiality, reliance and damage.

#### (a) Intent to Deceive:

The court found that Smith's nondisclosure of the Severance negotiations was intentional rather than inadvertent (M.D., App. 11; O.O., App. 2). But the intent requisite for actual fraud is a bad faith intent to deceive,

not merely that the act be consciously done. In 24 *O. Jur.* 2d 622, Fraud & Deceit § 5, the author writes:

“ . . . actual fraud involves moral guilt or intention to do wrong, positive, actual fraud being any cunning, deception, or artifice used to circumvent, cheat, or deceive.”

The court found that Smith, in not disclosing that it might buy Severance, was not actuated by malice or ill will (M.D., App. 17-18), by any intent to overreach Hilltop or any intent to make any pecuniary gain (O.O., App. 2, 8, 15). Rather, the court found Smith's sole motive was to carry out a commitment to The Austin Company to keep the negotiations confidential (O.O., App. 2, 15). As to the report itself, all of the judgments expressed were reached by employees who had no knowledge that Smith had any potential relationship to Severance other than as consultant to Austin (Marshall Tr., App. 92; Darmstadter Tr., App. 95).

At the close of the two and one-half week trial, the court was “of the very definite opinion that the concealment in law amounted to constructive fraud” (O.O., App. 2). Under Ohio law, constructive fraud will not justify the imposition of punitive damages. 25 *O. Jur.* 2d 34, Fraud & Deceit § 205. The distinction between actual and constructive fraud is expressed in 24 *O. Jur.* 2d 622-623, Fraud & Deceit § 5:

“Actual fraud must affect the conscience and involve wilful deception, while constructive or legal fraud may arise from the circumstances of the trans-

action or of the relationship of the parties, without the existence of fraudulent intent affecting the conscience.”

The trial court's findings on evidence negate any conclusion that Smith had any fraudulent intent.

**(b) Materiality:**

In determining whether the element of materiality was proven clearly, cogently and convincingly, one must inquire whether Hilltop would have employed Smith if it had known of Smith's interest in acquiring Severance. On this score, all relevant evidence indicates that such knowledge would not have affected Hilltop's decision to employ Smith:

(1) O'Neill's memorandum of the October 8, 1959 meeting with Treiger shows that he and Petti decided to hire Smith despite their view that Smith's loyalty to Austin would “prevent Smith & Company from making any recommendations . . . if [they] would interfere with their commitments on the Longwood [Severance] project . . .” (A.F., App. 48).

(2) Before, during and after Petti hired Smith, he firmly believed that Nutwood and Severance were non-competitive. Even when he testified at trial, Petti still believed that Nutwood did not conflict with Severance (Tr., App. 96-98). Since Petti believed Severance to be non-competitive, whether Smith was a consultant to

Austin or a prospective purchaser of Severance, was immaterial to Petti.

**(c) Reliance:**

It was reliance by plaintiffs on Smith's nondisclosure, not reliance by them on the Smith report which the district judge held constituted the element of reliance (M.D., App. 11-12). More or less parenthetically and in a different context the judge found that plaintiffs relied on the conclusions of the Nutwood study in selling the property (M.D., App. 10). We make brief note of the effect of reliance:

**(1) On the Nutwood Memorandum**

The court's finding that plaintiffs relied on the conclusions of the report is irrelevant to actual fraud since the court also found that the conclusions of the report had not been proven incorrect and that plaintiffs' assertions that they were damaged by their reliance were "no more than speculation or conjecture" (M.D., App. 10). Further, the court's finding of reliance on the conclusions of the report, irrelevant though it be, is contrary to the undisputed facts.

**(2) On Nondisclosure**

If plaintiffs did not rely on the report, whether they relied on Smith's statement that it was a consultant on

Severance is immaterial. To cite an illustration after the manner of the American Law Institute:

H employs a stockbroker S, to furnish him with advice. On the advice of S, H purchases stock in X corporation. S's advice proves to be sound. H later learns that S has acquired an interest in X corporation and that he was negotiating for same when he advised H. H. sues S for damages. S is not liable to H irrespective of whether a court finds that, in employing S, H relied on S's nondisclosure.

In short, it is almost too plain to argue that reliance upon the status of someone in ordering a service is an insufficient element of reliance in a damage action based on actual fraud unless it be further shown that the aggrieved party relied upon the service actually rendered and incurred damages thereby.

#### **(d) Damages:**

It is axiomatic that actual damage is an essential element of actual fraud. As we shall demonstrate in our argument in support of Specification of Errors Nos. 2, 3 and 4, no such damages were proven. Indeed the findings on evidence by the district judge are impossible to harmonize with a finding of actual damage.

#### **SPECIFICATION OF ERRORS NOS. 2, 3 & 4**

The trial court's findings of fact add up to the classic definition of nominal damages:

"Nominal damages are those recoverable when a legal right is to be vindicated against an invasion



that has produced no actual loss of any kind, or where from the nature of the case some injury has been done, the amount of which the proof fails to show" 16 *O. Jur.* 2d 139, Damages § 3.

The court found that Smith had violated a right of Hilltop and of the sisters to know that Smith might buy Severance. The court found further that they were not damaged in selling Nutwood on the strength of the report because (a) the conclusions of the report were sound, and, anyway (b) Nutwood was not worth any more than the price paid by Ridge Hills. The court's rationale in awarding compensatory damages was indicated where it found that:

"... there is sufficient evidence in the record to support a finding that the fair market value to the sisters of a reliable and trustworthy Nutwood market analysis was at least equal to the price which Larry Smith & Co. billed Hilltop for their analysis, or \$2,920.00" (M.D., App. 16).

The court made no identification whatsoever of what this "sufficient evidence" might be. There simply is no such evidence in the record, as the court itself had observed in its first memorandum decision (M.D., App. 12), wherein the court found that it could not "from the evidence ascertain what value a reliable market analysis had to the sisters . . ." (M.D., App. 12).

Assuming for argument that a "reliable" and factually unassailable analysis was worth \$2,920.00 to the sisters, why wouldn't an "unreliable" and factually unassailable analysis be worth just as much? Whatever use the sisters

made of the report, and the record is that neither ever read it (Ashcraft Tr., App. 126-27; Powell Tr., App. 128), their claim is that they used it as a reliable and factually unassailable report. They did not learn of Smith's negotiations on Severance until after they sold Nutwood. Hence, no action or inaction by them, or by O'Neill, could be predicated on their view that the analysis was untrustworthy.

The court measured damages as though the action were one for rescission or restitution. Yet, rescission was not pleaded. Hilltop never asked for its money back. Instead, it elected to pursue a remedy of damages. It confirmed its agreement with Smith by using the affirmative findings of the Smith report, both in selling to Ridge Hills, and in its vain efforts from 1960-1962 on behalf of Ridge Hills, to develop Nutwood as a retail center. The question arises:

*How can a remedy of restitution be applied when it was never prayed for, when Hilltop elected an inconsistent remedy, when Hilltop used the report extensively and is in no position to return it, and, most important of all, when Hilltop received exactly what it sought, a valid and correct report, prepared objectively by Smith employees who were unaware that Smith had any connection with Severance, except as consultant?*

More remarkable still is the court's award of \$2,920.00 to the sisters. All of the reasons why rescission was im-

properly granted Hilltop apply to the sisters. In addition, the sisters had no contractual relationship to Smith, and as the court found, they were in no sense third party beneficiaries of the Smith-Hilltop agreement (O.O., App. 3, 6-7).

### SPECIFICATION OF ERROR NO. 5

(a) In this diversity action, the law of Washington, the forum state, controls the choice of law to be applied on damages. Washington law forbids punitive damages as a matter of strong public policy. That a Washington judge, sitting in this case, would refuse to apply the Ohio law of punitive damages is clear under the Restatement, Conflict of Laws, often relied on by the Washington Supreme Court in resolving similar questions, and under analogous Washington precedents. In addition, exemplary damages are regarded as penal in character. It is axiomatic that an action may not be maintained to recover a penalty, the right to which is given by the law of another state.

(b) Even if Ohio law be applicable, the record is devoid of facts which would support a finding of punitive damages. The district judge's own findings are incompatible with its conclusion that defendants were "guilty of 'extreme and exceptional conduct' constituting a 'gross fraud' which was 'intentional and deliberate'" (M.D., App. 22). These epithetical characterizations of defendants' conduct are not supported by any factual findings, except that Smith did not disclose its negotiations on

Severance, which the court had felt, upon conclusion of the trial, amounted to "constructive fraud". The conclusion by the trial judge, almost a year later, that this same conduct was "gross fraud" and not "constructive fraud" is inconsistent with the facts found by the judge.

### SPECIFICATION OF ERROR NO. 6

While the court in its final memorandum opinion awarded more than nominal damages to both plaintiffs, in its initial decision it concluded that "*Schumacher v. Seifert*, 172 N.E. 420 (Ohio Ct. App. 1930), authorizes an award of punitive damages where, as here, actual though nominal damage is found" (M.D., App. 13). This finding may be moot in view of the judge's later retraction of his statement that the damages to the sisters were nominal. However, since this court might possibly view the facts differently, we believe that a discussion of the Ohio law on this point is appropriate. In summary, the Ohio cases hold that punitive damages may be authorized where actual, demonstrable, tangible damages are proved, even though the amount awarded be "nominal" in the sense that it is small. On the other hand, the requirement of actual damages is not satisfied by an award of nominal damages based upon a bare violation of legal rights.

### SPECIFICATION OF ERROR NO. 7

The court specifically found that defendants' conduct was not motivated by "actual malice, i.e., 'ill will or hatred'" (M.D., App. 17-18), but concluded that *Saber-*

*ton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224 (1946) authorizes punitive damages without a showing of "ill will or hatred" (M.D., App. 22).

Ohio law always has been that punitive damages could not be awarded in a bare case of fraud, but that some element of aggravation had to be present. Recent cases have established that the aggravating element required is actual malice, so that in order to award punitive damages the trier of fact must find actual fraud *and* actual malice. *Saberton* is not to the contrary.

### SPECIFICATION OF ERROR NO. 8

Ohio, in common with many other jurisdictions, requires that, where punitive damages are awarded, they must be in reasonable proportion to the compensatory damages proved. This is called "The Ratio Rule". The court relied in its Final Memorandum Decision on *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E. 2d 224 (1946) where the Supreme Court of Ohio reversed, 4-3, a trial judge's refusal to instruct on punitive damages. In that case a verdict of \$38.15 compensatory damages had been returned and plaintiff had asked for \$5,000 punitive damages. The district judge somehow read into this opinion a disapproval of the ratio rule (M.D., App. 23), despite the fact that the issue was not before the court. In our view, this action of the Ohio court, in a case where no issue was raised as to the "Ratio Rule", cannot be construed as a departure from



that rule. Further, the Ohio Supreme Court expressly approved the rule three years after *Saberton* in *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E. 2d 109, 112 (1949). Finally, plaintiffs themselves recognized Ohio's adherence to the "Ratio Rule", in filing a motion that attorneys' fees be classified as compensatory damages for purposes of the "ratio of 'compensatory' and 'punitive' damages . . ." (R. 2018-20).

### SPECIFICATION OF ERRORS NOS. 9 & 10

The court's stated reasons for imposing punitive damages on defendants — in the form of litigation costs and attorneys' fees — was that defendants "caused" the lawsuit (M.D., App. 14, 17). In turn, the underlying reason for the court's punishment of defendants — the reason why defendants caused the lawsuit, was said to be defendants' failure to disclose facts to plaintiffs before suit. We are completely at a loss to understand either the factual basis or the legal relevance of the court's views. Plaintiffs' own counsel and business advisor, Wilbert J. O'Neill, testified that defendants' attorney, Herbert Spring, at a meeting in Cleveland on February 15, 1961, attended by Petti and the general counsel of Hilltop, answered all questions fully and fairly. O'Neill testified in answer to a question from plaintiffs' trial counsel, as to what happened at the meeting:

"Well, Spring said something to the effect that he wondered what the difficulty was, and I told him that the difficulty was very simply stated that they had

accepted employment for professional purpose for pay at a time when they were already negotiating to buy property which we thought was conflicting property, and I asked him if I wasn't right, and when the negotiations began, and Spring, I thought, quite frankly, said that the negotiations by Larry Smith & Company to acquire from The Austin Company the Severance property, shopping center property, had been going on — my recollection is March 29, 1959, but things I have heard since indicate to me that, perhaps, it was May 29. I asked him whether the deal wasn't actually closed, and he said that it was closed on February 10, 1960, . . .” (Tr. 2666-67).

The district judge made it plain in his memorandum decisions that he was assessing costs of litigation and attorneys' fees against defendants under the label, “Punitive Damages”. For example, the award of punitive damages was “conditioned upon plaintiffs' filing of a waiver of any claim to costs in this action” (M.D., App. 25-26). Plaintiffs accordingly filed a “Waiver of Costs” (R. 2136-37). The amount of “punitive damages” awarded was \$75,000. The total amount of costs allegedly incurred by plaintiffs was \$72,406.42 (R. 2025-26). The court even assessed against defendants under the guise of punitive damages the expenses and attorneys' fees allegedly incurred by plaintiffs in prosecuting their specious antitrust claims, despite the fact that it had dismissed plaintiffs' antitrust claims a year before trial (R. 950-53).

### **SPECIFICATION OF ERRORS NOS. 11 & 12**

The court found appellants liable for punitive damages because of the acts of Treiger, their employee (M.D.,

App. 13-14). The grounds of the court's finding are not clear. Insofar as the court concluded that the partners could be liable for punitive damages on *respondeat superior*, it was in error. Ohio law forbids imposition of punitive damages on a principal because of an agent's acts unless the principal has authorized, ratified or participated in the wrong. *Tracy v. Athens & Pomeroy C. & L. Co.*, 115 Ohio St. 298, 152 N.E. 641 (1926). Insofar as the court found authorization or ratification, the finding is clearly erroneous, since the uncontroverted evidence is to the contrary. As to the apparent finding of authorization, the court's finding is even inconsistent with his oral remarks at the close of trial, wherein he observed that there appeared to be no evidence of authorization (O.O., App. 6).

## ARGUMENT

### **I. The Court's Conclusion that Appellants are Liable for Actual Fraud Is Contrary to the Court's Own Findings and to Uncontroverted Evidence (Specification of Error No. 1)**

#### **A. Introduction**

The trial judge recognized that this appeal would involve basically questions whether its conclusions of law were properly drawn from the virtually undisputed facts. In the hearing on presentation of judgment, the court observed:

"THE COURT: The way I view this, Mr. White,

you are in the rather fortunate position, I think, as far as an appeal is concerned, that for the most part anyhow an appeal on your part would involve only questions of law on which the Court of Appeals may very well differ with me. Mr. Stephan is in the less happy position if he wants to appeal in that his appeal would involve questions of fact. I largely found against him on the main cause of action, and on the agreed facts in the pretrial order there is no question of credibility, so the Court of Appeals, irrespective of how I treated them, could take a different view" (Tr. 2165-66).

This appeal turns largely on whether the court's conclusion that defendants were liable for actual fraud (M.D., App. 11, 12, 22) is supported by clear, cogent and convincing evidence as to each element.

The court's findings as to four of the elements, namely, intent to deceive, materiality, reliance and financial injury, are unsupported by or clearly contrary to the evidence. In addition, the ultimate findings of intent to deceive, reliance and financial injury are inconsistent with evidentiary findings of the court.

Since jurisdiction rests on diversity, most matters of substance are controlled by the law of Ohio, the situs of the alleged tort. However, matters of procedure, including quantum of evidence required, are governed by the law of Washington, the forum state. Restatement, Conflict of Laws § 595 and Comment a thereto (1934). In Washington, every element of a cause of action for fraud must be proved by clear, cogent and convincing evidence. *Baertschi v. Jordan*, 68 Wn. Dec. 2d 451, 413

P.2d 657 (1966); *Anderson v. General Motors*, 161 F. Supp. 668 (W.D. Wash. 1958), aff'd, 275 F. 2d 63 (9th Cir. 1960). In fact, as stated in *Asheim v. Pigeon Hole Parking, Inc.*, 175 F. Supp. 320 (E.D. Wash. 1959), aff'd 283 F. 2d 288 (9th Cir. 1960):

“ . . . The burden of proof upon the plaintiff is particularly heavy because, in Washington, as in many jurisdictions, the presumption of innocence of fraud is almost as strong as ‘the presumption ° ° ° of innocence of crime.’ ”

In Ohio, as elsewhere, certain elements are necessary to prove actual fraud. All must be shown by the requisite quantum of proof. The absence of one of them is fatal. 24 O. Jur. 2d 635, Fraud & Deceit § 20. The instant record reveals that four of the essential ingredients are missing.

#### **B. Intent to Deceive, a Necessary Element of Actual Fraud, Is Lacking**

Under Ohio law, actual, rather than constructive, fraud is required to support an action for damages for deceit. *Lake Hiawatha Park Assn. v. Knox County Agr. Soc.*, 28 Ohio App. 289, 162 N.E. 653 (1927); *Fillegar v. Walker*, 54 Ohio App. 262, 6 N.E. 2d 1010 (1936); 24 O. Jur. 2d, 622, 634-35, 703-04, Fraud & Deceit § § 5, 20, 109. In fact, it is the element of intent to deceive which distinguishes actual from constructive fraud. *Kuchner v. Johnson*, 33 Ohio L. Abs. 401, 34 N.E. 2d 996, 1003 (1940). “Intent to deceive” involves something more than that an act be consciously done. *Green Bay Auto*



*Distributors v. Willys-Overland Motors, Inc.*, 102 F. Supp. 151 (W.D. Ohio 1951), aff'd per curiam, 202 F. 2d 151 (6th Cir. 1953); 24 *O. Jur.* 2d 622, Fraud & Deceit § 5.

Phrased another way:

“... to constitute a cause of action [for actual fraud], there must be bad faith” 24 *O. Jur.* 2d 709, Fraud & Deceit § 116.

The Ohio Supreme Court defined “bad faith” in *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148, 187 N.E. 2d 45 (1962). Syllabus 2 written by the court reads:

“2. A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.”

It is easy to second guess the decision to take on the Nutwood study. But it should be remembered that Petti told Treiger in their first telephone conversation, after Treiger warned him that:

“... We are working on the Longwood property and felt that there may be some conflict in our own position. . .”,

that he thought there would be no conflict because:

“... he did not think his property would pull very far from the west” (A.F., App. 44).

O'Neill's memo of the October 8, 1959 meeting with Treiger says:

"Treiger emphasized the possible conflict of interest between his firm's loyalty to Austin and Severance and any recommendations he might make to the promoters of the Nutwood project . . ." (A.F., App. 48).

If Treiger had a "dishonest purpose" as required in the Ohio Supreme Court's definition of bad faith, he would not have emphasized the possible conflict of interest. He would have played it down. He would not have emphasized his firm's loyalty and commitment to Severance. He would have minimized it.

Nor did Treiger's later conduct indicate any desire to capitalize on the dual relationship with Severance and Nutwood. Instead, the study was turned over to two key employees, John Marshall and Tom Darmstadter, who exercised their best professional judgments on Nutwood, unfettered by any knowledge that their employer might buy Severance, and unfettered by any intervention by any Smith employees who did have such knowledge (Marshall Tr., App. 90-92; Darmstadter Tr., App. 94-95). It is hard for us to discern how the overall handling of the Nutwood inquiry by Smith fits the bad faith definition of the Ohio Supreme Court requiring dishonest purpose or ulterior interest. In retrospect, against the knowledge that the Smith firm successfully financed an interest in Severance and that the Nutwood report turned out negative, it is perhaps unfortunate that the firm agreed to help Hilltop. But at the very worst, the nondisclosure constituted constructive fraud since the element of intent

to deceive, as defined in the Ohio decisions, is totally lacking.

### **C. Materiality, a Necessary Element of Actual Fraud, Is Lacking**

The crucial test of materiality is, of course, whether Smith would have been employed if Treiger had said that in addition to its consulting responsibilities Smith was considering the acquisition of a proprietary interest in Severance. All the evidence on the point indicates that Smith would have gotten the job anyway.

O'Neill's flat statement that Smith's "loyalty to Austin and Severance might reasonably be expected to prevent Smith & Co. from making any recommendations . . . but it was considered worthwhile to get Smith's survey and recommendations, having in mind that his work on the Longwood project had given him a great deal of background information . . .", raises a strong inference that O'Neill and Petti would have hired Smith if they had known of the Severance negotiations (A.F., App. 48). Moreover, Petti always insisted, and testified at trial, that Severance and Nutwood would cater to distinct trade areas. They were essentially non-competitive. Petti drew his own trade area for Nutwood, which did not touch the Severance site (Tr. 290-295, 320-322). Petti told the president of The May Company that Nutwood was a good spot for a May branch because Nutwood and The May Company's branch at Cedar Center did not conflict (A.F., App. 87-88, See Tr. 421-425). Yet, Cedar Center is virtually the

same distance southwest from Nutwood as Severance (See Plate 1). Petti told Treiger in their very first conversation that Smith's Severance connection did not bother him because he did not believe Nutwood would pull to the west anyway.

The test of materiality under Ohio law is stated in 24 O. Jur. 2d 695, 696, Fraud & Deceit § 99:

"A fact is material when it influences a person to enter into a contract or when it deceives him and induces him to act, or when without it the transaction would not have occurred." See *Twachtman v. Connelly*, 106 F. 2d 501, 506 (6th Cir. 1939).

The undisputed facts that Hilltop hired Smith knowing of Smith's pre-existing commitment and loyalty to Severance and of Petti's unshakeable conviction that Nutwood and Severance did not conflict, because Nutwood would not pull to the west, simply do not support a finding that Hilltop would have hired another consulting firm if it had known of the pending Smith-Austin negotiations.

#### **D. Reliance, a Necessary Element of Actual Fraud, Is Lacking**

The court's basic finding on reliance was.

"Hilltop relied on such belief [that Smith was no more than a consultant on Severance] in selecting Smith to produce a market analysis and all plaintiffs relied thereon in determining their course of conduct after the negative report was received" (M.D., App. 11-12).

The reliance which the court found to be an ingredient

of fraud is thus reliance on the nondisclosure and not reliance on the report. Even if we assume for argument that O'Neill and Petti relied upon Treiger's statements as to Smith's consulting relationship, and that they also had these statements in mind when they sold Nutwood, such reliance would be of no consequence unless they relied on the Smith report, *and* the Smith report was incorrect. Does one who relies in purchasing a business on true and correct statements by a broker that the business has certain income, inventory and accounts receivable have an action in damages against the broker if he learns later that the broker was considering the purchase of an interest in a competing business? In this case the court stated his belief in "the accuracy of the conclusions in the report" (R. 2089) and held that the "plaintiffs relied on the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills (M.D., App. 10). In these circumstances, whether plaintiffs relied on the nondisclosure either in hiring Smith or selling Nutwood is immaterial. The court held there was no proof that Nutwood was worth a nickel more than Ridge Hills paid for it. Hilltop was paid \$56,580.75 as its brokerage commission (R. 1238) and went to work for the new owners before the sale to them was even closed (Kammer Tr., App. 123). O'Neill was paid \$27,828.00 for his services to the sisters, 5% of the total sales price (R. 1238). The sisters received \$613,161 from Ridge Hills plus \$245,000 from previous sales to others (R. 1056) or \$858,161 for property which had



been appraised in 1952 at \$190,510 (R. 1055). Smith received \$2,920 for a valid and correct memorandum, for which it is now sued for \$8,862,500 plus attorneys' fees (R. 113). The irony is that not only was the Smith report a sound one, but the evidence is clear, cogent and convincing that plaintiffs did not rely upon it. That evidence, which we will not repeat here, was summarized in our "Statement of the Case", *supra*, p. 19-25. It has a sort of ten-pin aspect. Mrs. Powell who was in the Virgin Islands relied on her sister Mrs. Ashcraft, who was in Madrid; Mrs. Ashcraft relied on O'Neill and O'Neill relied on Petti (Tr., App. 125, 128, 62-64, 65-69).

Boiled down, the issue is whether Petti relied. We have Petti's word under oath that he relied only on the optimistic parts of the Smith report and rejected the pessimistic parts (Tr., App. 114). This should need no confirmation. But there is an amplitude of supporting evidence. First, we have Petti's own letter to Peter Galvin, Ex. 348A, sent three weeks after receiving the Smith report, in which he boasted of Nutwood's unique qualities as a regional shopping center site. Second, we have the testimony of Karl Kammer, a member of the Cleveland bar, who had no interest in these proceedings, who testified that Petti told him and his clients, Harry Ratner and Fred Stark, on three or four occasions after receiving the Smith report, that "This is a great location for a shopping center complex" (Kammer Tr., App. 119-120). Petti said this not as a sales puff. He went right to work

for Ridge Hills to line up stores. He spent two and one-half years at this occupation, and gave up only in April, 1962 (Appendix, Part V). Since he couldn't interest anyone in Nutwood as a shopping center, he turned to litigation. His central theme in the litigation was that Nutwood had been sold to Ridge Hills as residential property after the Smith report (Tr. 378-384). In fact, he stated that Harry Ratner was purely a residential developer (Tr. 368-370). As residential property, he claimed it was worth \$3,500 an acre. Actually Petti sold Nutwood as a regional shopping center. Ridge Hills purchased it for the purpose of developing such a center (Kammer Tr., App. 121-122). Petti never relied on the Smith report's negative conclusions for one minute. If he had, he would have saved himself two years of hard work. His vain attempts from January, 1960 until April, 1962 to develop Nutwood as a regional center provide the most eloquent refutation of his reliance.

#### **E. Specific Damage or Financial Injury, a Necessary Element of Actual Fraud in Ohio, Is Lacking**

In Ohio, as elsewhere, in a damage action for fraud:

"... Plaintiff must allege and prove some specific damage sustained because of the deceit or fraudulent conduct" *Twachtman v. Connelly*, 106 F. 2d 501, 506 (6th Cir. 1939).

Also see *Miller v. Knight*, 115 Ohio App. 485, 185 N.E. 2d 770 (1961); 24 *O. Jur.* 2d 634, Fraud & Deceit § 20.

As to what constitutes damage, Ohio Jurisprudence

states:

"Negatively framed, the rule as to what constitutes damages, in any case, may be stated broadly to be that there is no damage where the position of the complaining party is no worse than it would have been had the alleged fraud not been committed" 24 O. Jur. 740, Fraud & Deceit § 151.

First, as to the sisters, it could not possibly be said seriously that their position was worsened because of the Smith report. Their situation was improved. Their advisor, O'Neill, received a copy of a report which correctly concluded that their property was not suitable for a regional shopping center. They sold Nutwood to Ridge Hills for its full value. Nevertheless, the court awarded the sisters \$2,920.

The judge's reasoning was that the sisters were somehow injured by being contaminated by their agent's contact with a report which held the possibility of non-objectivity because of Smith's negotiations on a property their agent testified to be wholly non-competitive with Nutwood. Even if this occurred, the event would not satisfy the requirement that the sisters show specific damage.

Second as to Hilltop, it paid Smith \$2,920 for a report which it used extensively in its efforts to sell Nutwood for the sisters and for Ridge Hills.

It was only in *failing* to rely on the negative conclusions of the report that Hilltop worsened its position by working two years in vainly trying to make Nutwood a

regional shopping center. It received a report which its own expert at trial, Dr. John M. Rienstra, testified was made according to "acceptable methods", and which contained no substantial errors of fact, except for one concerning the floor area of a Sears store (Tr., App. 132). As to this alleged error, Petti spotted it and brought it to Treiger's attention as soon as he received the report (Tr. 337-47, Ex. 45). The court found, "Thus, Smith fully performed its contract, in spite of what later proved to be inconsequential errors in its report" (M.D., App. 17). The court made it clear that Hilltop got its full money's worth under its agreement with Smith.

From the foregoing one conclusion must be drawn. Plaintiffs did not prove that they were damaged either in the financial injury sense or in the broadest sense that their position was worsened by the Smith report.

## **II. The Court's Conclusion That Hilltop and the Sisters Are Entitled to Compensatory Damages In the Amount Paid By Hilltop For The Report Is Inconsistent with the Court's Findings (Specification of Error No. 2)**

The court's findings as to damages were that plaintiffs incurred none in relying upon the report and in selling Nutwood (M.D., App. 10). The court's further conclusion that Hilltop did incur damages in the amount paid for the report (M.D., App. 12, 16, 25) collides not only with its evidentiary findings of no damage in selling Nutwood, but also with its finding that Smith fully performed its

contract with Hilltop (M.D., App. 17). Since the sisters claim to have relied fully upon the report, without any knowledge that it was "legally worthless" or "untrustworthy", and the court has found that they suffered no harm thereby, how is it that this "legally worthless" but factually valuable report produced damage to them? What the court seems to have done is to grant Hilltop and the sisters some species of rescission.

### **III. The Court's Award of the Price of the Report to Hilltop Amounts to Granting Relief of Rescission, Contrary to Hilltop's Election to Sue for Damages (Specification of Error No. 3)**

The damages awarded amount to a decree of restitution or rescission. The court found, in effect, fraud in the inducement (M.D., App. 16). But the judgment is in error for several reasons. First, actual damage, not proven here, is a requirement even in rescission cases. *Block v. Block*, 165 Ohio St. 365, 135 N.E. 2d 857 (1956); *Miller v. Knight*, 115 Ohio App. 485, 185 N.E. 2d 770 (1961). Second, rescission was never pleaded and no issue of rescission was framed in the pretrial order. Third, notice of election to rescind was not given promptly after the facts claimed to warrant restitution became known. Fourth, damages and rescission based on fraud are inconsistent remedies. One must elect between them. Plaintiffs elected to sue defendants for damages when they filed this action. These rules apply in all jurisdictions, including Ohio. 25 O. Jur. 2d 7-8, Fraud & Deceit § § 172-73.



Finally, Petti put the possibility of rescission irrevocably behind him when he used the Smith report in his continued promotion of Nutwood (Tr. 507, 510). Hilltop's standard promotional pitch for Nutwood invariably contained, for years after he learned of Smith's interest in Severance, large verbatim passages from the favorable portions of the Smith report. (See e.g., Ex. 348A, dated January 25, 1960; Ex. 235, a brochure prepared for The May Company, June 29, 1960; Ex. 239, a brochure prepared for The Higbee Company, October 18, 1960; Ex. 211A, a brochure prepared in April, 1961).

It is still more difficult to understand the court's award to the sisters on an apparent rescission theory. The court expressly found that the sisters were not third party beneficiaries of the Smith-Hilltop contract (O.O., App. 3, 6-7). Rescission is not ordinarily granted to strangers to an agreement. They have nothing to restore or to have restored. The court's apparent rationale of its award to the sisters was that Hilltop was obligated to provide the sisters with a market analysis. We do not understand how an award to the sisters can be supported by this finding. In any event, it is clearly contrary to the evidence.

#### **IV. The Court's Finding That Hilltop Was Obligated to Provide a Market Report to the Sisters Is Contrary to the Agreement Between Plaintiffs (Specification of Error No. 4)**

In view of the court's dismissal of the sisters' action for breach of contract, the court's finding that Hilltop had

a duty to furnish them with a report may be of no practical moment. However, if the award of \$2,920 to the sisters is rationalized on some contractual theory, which seems to be what the lower court was saying in its initial memorandum (M.D., App. 17), then such finding has practical effect.

The court's finding is contrary to the agreement itself. It will be seen from the partial text of the agreement reprinted at pages 41-42 of the appendix hereto that Hilltop did not agree to procure a market analysis as a condition of its exclusive. Rather, it was agreed that its exclusive would be extended beyond December 31, 1959 if two of five stated objectives had been accomplished before that date, and that Hilltop's failure to accomplish two of the objectives should not preclude an extension (Ex. 197A, p. 4). Moreover, under Ohio law, one who furnishes a professional report is liable only to the person employing him. *Thomas v. Guarantee Title & Trust Co.*, 81 Ohio St. 432, 91 N.E. 183 (1910).

**V. The Award of Punitive Damages and Attorneys' Fees Is Contrary to Law and Contrary to the Facts Found by the Trial Judge (Specification of Error No. 5)**

**A. A Washington Judge Sitting in this Diversity Case Would Refuse to Apply Ohio Law on Punitive Damages and Attorneys' Fees Which Conflicts with the Long Established Public Policy of Washington**

**1. General Considerations:**

A District Court in a diversity case will look to the

law of the forum state regarding matters of substantive law. *Eric R. Co. v. Tompkins*, 304 U.S. 64 (1938). Conflict of laws rules are substantive, so the court will follow the conflict rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Therefore it is the law of Washington which controls the choice of law regarding the possibility of recovery of punitive damages.

## 2. Washington Law:

Washington rejects the doctrine of punitive damages as a matter of public policy. In an unbroken line of cases from *Spokane Truck and Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891) to *Conrad v. Lakewood Gen. Hosp.*, 67 Wn. Dec.2d 925, 410 P.2d 785 (1966), the court has held that punitive damages cannot be awarded in Washington. The classic statement of the rule is found in the *Spokane Truck* case, 2 Wash. at 53-54:

“ . . . Surely the public can have no interest in exacting the pound of flesh. . . . It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice.”

The court summarized its position by stating,

" . . . we believe the doctrine of punitive damages is unsound in principle and unfair and dangerous in practice. . . ." 2 Wash. at 56.

The Washington court frequently has referred to punitive damages as punishment. A recent restatement of the view taken in *Spokane Truck* that punishment is the prerogative of the state and has no place in a civil action is found in *Browning v. Slenderella Systems*, 54 Wn.2d 440, 341 P.2d 859 (1959).

The Washington Supreme Court has not been called upon to pass on the enforceability of foreign punitive damage laws. It has, however, on several occasions refused to enforce other foreign laws on the ground of public policy, about which its expressions are mild indeed, compared to its strong views on punitive damages. Leading cases are *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613 (1910) (rejecting California law limiting liability of a common carrier) and *Farley v. Fair*, 144 Wash. 101, 256 Pac. 1031 (1927) (rejecting Oregon law as to statute of frauds).

### 3. Conflict of Laws Rules:

Washington, in dealing with conflict of laws questions, follows closely the approach taken by standard authorities such as the Restatement, Conflict of Laws and Beale's text. See *Richardson v. Pacific Power & L. Co.*, 11 Wn.2d 288, 118 P.2d 985 (1941). As to the enforcement of foreign punitive damage laws those authorities state:

Restatement, Conflict of Laws (1934):

"Section 421. EXEMPLARY DAMAGES.

"The right to exemplary damages is determined by the law of the place of wrong.

"Comment:

"a. *When damages regarded as penal.* In those states where exemplary damages are never allowed, such damages may be refused in an action on a foreign wrong, whatever the law of the place of wrong, on the ground that they are penal (See Section 611) . . .

\* \* \*

"Section 611. ACTION FOR A PENALTY.

"No action can be maintained to recover a penalty the right to which is given by the law of another state.

"Comment:

"a. A penalty as the word is used in this Section is a sum of money exacted as punishment for a civil wrong as distinguished from compensation for the loss suffered by the injured party. . . .

"b. Examples of a penalty which cannot be recovered in another state are: . . .

- "3. penal or exemplary damages awarded in addition to full compensation, when action is brought in a state which does not award such damages on the ground that to do so would be to impose a penalty.

\* \* \*

"Section 612. ACTION CONTRARY TO PUBLIC POLICY.

"No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

2 Beale, Conflict of Laws § 421.1 (1935):



"Exemplary damages are not regarded as penal in most states. If such damages are allowed at the place where the wrong was done, they are recoverable in any state which allows such damages. In a state, however, where exemplary damages are not allowed, *such damages cannot be included, whatever the law of the place of injury, for they would be regarded as penal.*" (Emphasis added).

The Washington policy is a perfect example of the applicability of Restatement § 421, Comment a, and the last sentence of 2 Beale § 421.1. Indeed, if these sections did not apply to the Washington situation, they would have virtually no meaning since there are only three states in addition to Washington which refuse to award punitive damages. 25 C.J.S. 1112-13, Damages § 117(1).

#### 4. Ohio Law:

The Ohio law of punitive damages will be discussed more fully in succeeding sections of this brief. For present purposes, it is sufficient to note two features. First, just as Washington does, Ohio regards punitive damages as punishment and as a penalty. *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224, 229 (1946), wherein the court quoted from *Atlantic & Great W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382. Hence, the type of damages which a Washington judge would be asked to award here is the very type which Washington emphatically rejects as contrary to public policy.

The second point of significance is that the doctrine has been seriously criticized in Ohio. *Saberton v. Green-*

*wald*, 146 Ohio St. 414, 66 N.E.2d 224, 229 (1946), the point of departure for all recent Ohio decisions on the subject, was decided four to three. The dissenting opinion attacked not only the extension of the doctrine of punitive damages to the case before it, but the entire concept.

The dissent cited, *inter alia*, *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891).

In view of the unusually strong public policy enunciated by the Washington Supreme Court at every opportunity against punitive damages, in view of Washington's adherence to the Restatement and Beale, and the position taken by those authorities, and in view of the fact that the doctrine survives in Ohio by the slender thread of a single vote, it seems plain that Washington would refuse to apply the Ohio law of punitive damages.

#### **B. The Court's Finding That Appellants Are Liable for Punitive Damages is Inconsistent with the Court's Evidentiary Findings.**

In its tentative opinions delivered immediately after hearing the evidence the court expressed the fixed opinion that Smith's nondisclosure amounted to constructive fraud (O.O., App. 2). After learning through post-trial briefs that constructive fraud would not support the assessment of punitive damages, the court found the same nondisclosure to constitute actual fraud because it showed "a wanton or reckless disregard for the rights of others . . ." (M.D., App. 12). After being fur-

nished with further briefs which indicated that if "wanton or reckless disregard" was ever a sufficient predicate in Ohio for punitive damages, that day was long past, the court announced that the same nondisclosure constituted "extreme and exceptional conduct" constituting a "gross fraud" (M.D., App. 22). In Section VIII of this brief, we point out that even this finding is insufficient, in the absence of a further finding of "actual malice." Here, we merely refer the court to several Ohio cases which, together, demonstrate the type of conduct required for imposition of punitive damages in Ohio. We shall not extend this brief by repeated detailed reference to the trial court's evidentiary findings. We do ask this court to compare the criteria for punitive damages in Ohio with admitted facts and findings that Smith's employees were not actuated by desire for gain (O.O., App. 8-9, 15), that Treiger told plaintiffs of Smith's continuing consulting relationship to Severance and its previous loyalty and commitment to that project (A.F., App. 48), that Petti assured Treiger that Severance and Nutwood were totally non-competitive (A.F., App. 44-45, Tr. 291), that the Nutwood study was carried out by personnel who did not know of Smith's possible potential interest in Severance (Tr., App. 88-95) and that the report, after three years of unrelenting attack upon it, was found by the court to be accurate (R. 2089). Again, we say that the nondisclosure, when viewed at the worst, was an honest mistake in judgment. It was, after all,

Smith's connection with Severance which plaintiffs felt they could capitalize on, which caused them to employ Smith (A.F., App. 48, see App. 40-41). The conduct of Smith's employees, as revealed by the undisputed record, simply does not fit the "very corrupt condition of affairs" (*Cable v. Bowlus*, 11 Ohio Cir. Dec. 526 (1904)) required to move the court to punish the defendants in a civil action.

In *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224, 230 (1946), the court quoted from 13 *O. Jur.* 238, in reviewing the general policy on punitive damages,

"... the principle of permitting damages beyond naked compensation is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design which prompted him to the wrongful act."

## **VI. An Award of Nominal Damages Will Not Support An Award of Punitive Damages (Specification of Error No. 6)**

We do not believe that any tort was committed, and, therefore, do not believe that plaintiffs should have been awarded any damages, even nominal. But even if this court should hold that there was a tort, there were no actual damages. At most, nominal damages would be proper, for a technical invasion of plaintiffs' rights.

The Supreme Court of Ohio in *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E.2d 109 (1949), in adopting a quotation from *Am. Jur.*, pointed out the distinction between nominal damages awarded for a bare violation of legal

rights which produced no damage, and actual damages, so small in amount as to be loosely described as "nominal." The fact that the court considered the terms "nominal" and "actual" to be mutually exclusive is shown by the court's statement that

"[T]he record clearly shows that there were no damages, either actual or nominal." 85 N.E.2d at 111.

Therefore when the court in *Richard* held in its syllabus that

"Exemplary or punitive damages may not be awarded in the absence of proof of actual damages"

it clearly held that punitive damages may not be added to nominal damages. Accord, *Cahill v. Fidelity & Cas. Co.*, 37 Ohio App. 444, 175 N.E. 39 (1930) and *Levin v. Elyria Sign Co.*, 1 Ohio App.2d 512, 206 N.E.2d 38 (1965).

#### **VII. Since the Court Found that Defendants Were Not Guilty of Actual Malice, Punitive Damages and Attorneys' Fees cannot be Awarded (Specification of Error No. 7)**

The starting point in discussing punitive damages has been *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224 (1946), although more often than not, reference has been made to the *dissent* for a correct statement of Ohio law. The frequently quoted passage from the *Saberton* dissent is as follows:

"This court has, over the years, recognized the propriety of submitting to a jury the question of the



assessment of punitive damages in certain tort cases where the defendant's wrongdoing has been intentional and deliberate, or has the character of outrage frequently associated with crime. Not all tort actions are of such a character as to warrant the assessment of punitive damages. *Generally the application of the doctrine is confined to cases where there is involved actual malice, interference with marital relations, or wanton personal injury*, such as in cases of seduction, assault and battery, false imprisonment, or wrongful expulsion from public passenger vehicles or places of public entertainment." (66 N.E. 2d at 334; emphasis added)

Even though found in a dissenting opinion, this summary is the law of Ohio. In adopting this statement of the rule, the Supreme Court in *Smithhisler v. Dutter*, 157 Ohio St. 454, 105 N.E.2d 868, 872 (1952), noted that even in *Saberton* "there was no division upon this statement."

According to this rule, punitive damages are limited to cases involving (1) actual malice (2) interference with marital relations and (3) wanton personal injury. Only the first could apply to the present litigation. The necessary inference that in a fraud case actual malice is a prerequisite to punitive damages was made an explicit rule in *Waters v. Novak*, 94 Ohio App. 347, 115 N.E. 2d 420 (1953).

In *Sears v. Holly*, 113 Ohio App. 349, 178 N.E. 2d 91 (1960), the *Waters* holding was repeated. Again quoting from the dissent in *Saberton*, the court followed *Waters* and held an instruction prejudicially erroneous which stated that implied malice was sufficient to award punitive

damages in a fraud action. A recent federal case in Ohio also held actual malice to be the *sine qua non* of a recovery of punitive damages in an action for misrepresentation. *Nagel v. Prescott & Co.*, 36 F.R.D. 445 (N.D. Ohio 1964).

Moreover, in two recent opinions the Ohio Supreme Court has reaffirmed that actual malice is a prerequisite to an award of punitive damages. *Davis v. Tunison*, 168 Ohio St. 471, 155 N.E. 2d 904 (1959); *Pickle v. Swinehart*, 170 Ohio St. 441, 166 N.E. 2d 227 (1960). In *Pickle*, the court stated that actual malice and ill will are the same (166 N.E. 2d 229).

The argument that *Saberton* justifies awarding punitive damages for "wanton disregard" cannot be reconciled with the Ohio Supreme Court's later opinion in *Rogers v. Barbera*, 170 Ohio St. 241, 164 N.E. 2d 162 (1960).

In *Rogers*, a malicious prosecution case, the court went so far as to correct the syllabus in *Davis v. Tunison*, 168 Ohio St. 471, 155 N.E. 2d 904 (1959), to remove a suggestion contained therein that actual malice could be inferred from "prosecution of one wantonly, recklessly and without justification".

*Rogers* is the most recent holding by the Supreme Court of Ohio on the subject. It is quite explicit. We note further that the Ohio Supreme Court in 1933 declared that attorneys' fees, which are awarded only when punitive damages are assessed, are not assessable unless there

is proof of actual malice. *New York, Chicago & St. L. R. Co. v. Grodek*, 127 Ohio St. 22, 186 N.E. 733 (1933); also see *Fremont Oil Co. v. Marathon Oil Co.*, 192 N.E. 2d 123, 130 (Ohio Com. Pl. 1963).

### **VIII. Punitive Damages Must Bear a Reasonable Relationship to Compensatory Damages. (Specification of Error No. 8)**

For many reasons already discussed herein, any award of punitive damages against appellants would be erroneous. But assuming for argument that such an award is proper, the amount set by the district judge was excessive, since it is not in a reasonable ratio to compensatory damages, as required by Ohio law. The Supreme Court of Ohio in *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E. 2d 109, 112 (1949) quoted from a leading West Virginia case:

“Moreover, where there is a legal finding of compensatory damages, punitive damages, if awarded, must bear a reasonable proportion to the compensatory damages so found.”

The Ohio court then stated:

“In accordance with the majority rule, as shown by the above cited authorities which have our complete approval, the verdict returned by the jury in the instant case was defective and did not authorize a judgment in favor of the plaintiff”. (Emphasis added).

In the present case neither the punitive damages nor the attorneys' fees awarded bear any reasonable relation-

ship to the actual damages. Actual damages, assuming for argument that they really are such, total \$5,840.00. Any punitive damages awarded must, therefore, be limited to a low multiple of \$5,840.00, far less than the \$75,000.00 awarded. Attorneys' fees awarded as an incident of punitive damages must, moreover, be in reasonable proportion to the actual damages awarded. Otherwise, the "ratio" rule would be rendered meaningless.

#### **IX. Plaintiffs Knew All Essential Facts of the Smith-Austin Relationship Years Before They Commenced This Action (Specification of Error No. 9)**

The following finding and conclusion by the court are erroneous:

"... Smith . . . deliberately withheld information, the disclosure of which in all probability would have rendered this expensive lawsuit unnecessary. In the court's view these facts amply justify an award of punitive damages in an amount sufficient to compensate plaintiffs for the expenses of this lawsuit . . ." (M.D., App. 17; see also M.D., App. 14).

In so finding, the court was not referring to the original nondisclosure when the Smith firm was retained. This is clear from colloquy between the court and counsel during an argument on April 22, 1966. From its remarks there it is clear that the court incorrectly felt that Hilltop had to bring suit to discover the basic facts of the Smith-Austin negotiations (R. 2123-25, 2132-34). This is entirely contrary to the direct testimony of plaintiffs' own witness,

Wilbert J. O'Neill:

1. On August 12, 1960, within two weeks after the newspaper release announcing Smith's interest in Nutwood, and before O'Neill and Petti met with Treiger, Petti told O'Neill that he had already "complained bitterly" to Treiger about the fact "that when they accepted this employment they were already negotiating to buy" Severance (O'Neill Tr., App. 129). Petti repeated his complaint to Treiger at the meeting (O'Neill Tr., App. 130-131).

2. Herbert Spring, Smith's lawyer in Cleveland, told O'Neill and Petti on February 15, 1961 that the Smith-Austin deal was closed on February 10, 1960, and that the negotiations had been going on since March, 1959, six months before the initial Hilltop-Smith contact.

Counsel for Hilltop at the argument on April 22, 1966, when confronted with O'Neill's testimony, quickly shifted to a position that the real trouble was that Smith had suppressed the workpapers from which the memorandum was written (R. 2123-25). Counsel for Smith reminded the court that the workpapers had never been requested before suit was commenced and the court said, "That may very well be" (R. 2132). The fact is that it was the court who had asked the secretary of Hilltop whether they had ever sought Smith's workpapers and received the reply, "No, sir" (Crume Tr., App. 131).

The court's final reason for feeling that plaintiffs were



justified in bringing suit, and should, therefore, be awarded \$150,000 for litigation costs was a recollection, without looking at its notes that, "there were quite a few letters asking for information that they never got a response to" (R. 2134).

What letters? Petti first wrote to Treiger on August 2, 1960 (A.F., App. 80). Treiger went to Cleveland on August 10 or 12 and had dinner with Petti and O'Neill to explain Smith's position. He left them copies of a memo explaining that position (A.F., App. 80-85). Petti and O'Neill were, of course, at liberty to disagree with that position. But the discussion centered on whether Smith was right or wrong, not on whether Petti and O'Neill had the facts. Petti already knew before the meeting that the Severance negotiations had preceded Hilltop's retention of Smith.

Next came a letter from Hilltop to Treiger on September 17, 1960, followed up by a letter from Hilltop's attorney on October 20, 1960 (A.F., App. 85-87).

In response to these letters, the Smith firm assigned a top employee who had not worked on the original analysis to review the Nutwood study to make certain that it was basically correct. Shortly after the review memorandum (Ex. 10) was prepared, Petti, O'Neill and Petti's lawyer were invited to the meeting in Spring's office, where they were given copies of the review.

As time passed after February 15, 1961, Smith could

feel that the Nutwood affair was closed. But some time after Petti finally exhausted his efforts to promote Nutwood in April, 1962, he decided to litigate. Strangely, Petti decided to sue only after his fruitless promotion of Nutwood had provided the ultimate vindication of Smith's conclusions.

The court stated that Smith "deliberately withheld information, *the disclosure of which in all probability would have rendered this expensive lawsuit unnecessary*" (M.D., App. 17, emphasis added). The court's finding seems illogical in view of the cross appeal filed by plaintiffs in this court. Almost four years after action was commenced, after several thousand pages of pleadings, several thousand more pages of depositions and several thousand more pages of testimony at trial and hundreds of exhibits produced by Smith, this expensive lawsuit is still necessary to plaintiffs.

Even were one to assume, contrary to the evidence out of the mouths of plaintiffs' own witnesses on direct examination, that the Smith firm failed to cooperate in Hilltop's investigation of Smith's conduct after the public announcement, the question remains whether this fact justifies the imposition of litigation costs against the present appellants in the form of punitive damages.

**X. In Deciding Whether to Impose Punitive Damages and Attorneys' Fees, the Court Used an Incorrect Criterion, Namely, Whether Plaintiffs Were Justified in Bringing Suit. (Specification of Error No. 10)**

The court's view that the lawsuit was "caused" or could have been avoided by some disclosure by Smith is mistaken. When plaintiffs completed discovery in this case, they did not move for voluntary nonsuit and say, "If we had only known, we would never have commenced suit. Why didn't you tell us?" Rather, they increased their prayer by \$7,000,000 and prepared to go to trial. Indeed, if Hilltop had asked for return of its \$2,920 Smith easily might have complied to avoid a lawsuit. Defendants were not only never offered this alternative, but, according to Treiger's memo of his August, 1960 meeting, Petti and O'Neill did "not question the fact that they owed us the money and would have paid us in any event" (A.F., App. 85).

If plaintiffs' complaint had simply sought return of the \$2,920 to it as now ordered by the court, defendants would have been afforded an opportunity to settle the matter at the threshold. Instead, defendants were faced with baseless monopoly claims for millions upon millions of dollars. To hold that defendants must pay \$150,000 to plaintiffs for litigation expense is to penalize defendants for defending themselves against claims which the court has found to be without merit. And yet, that is the effect of the court's action. It expressly held that defendants must pay plaintiffs' attorneys' fees and litigation expenses attributable to the specious state and federal antitrust claims (M.D., App. 17). Nowhere in the record is there the slightest suggestion that plaintiffs asked de-

fendants any question bearing on antitrust before filing their complaint.

In sum, judgment for "actual" damages in an amount which is considerably less than the amount necessary to claim jurisdiction in a diversity case was awarded on one of four causes of action against the original three Smith partners and their wives, and, to the extent of their interest in the firm assets, against two more partners and their wives, out of twenty-six defendants named in the caption. The court's theory of punishing these defendants was not, according to its decisions, for the conduct of their employees in failing to disclose the Severance negotiations but was apparently based on the judge's idea that Treiger did not answer Petti's letters promptly enough.

#### **XI. The Court's Finding That the Partners Were Aware of Treiger's Conduct is Contrary to the Undisputed Evidence. (Specification of Error No. 11)**

The district court attempted in two ways to tie the partners in to the acts of Treiger. It first found that:

" . . . The company's method of doing business, of keeping the partners in its far-flung organization informed, and its system of reading files make the inference inescapable that one or more of the partners was aware of the concealment and at least acquiesced therein" (M.D., App. 13).

It should be noted that part of the finding, that the Smith organization was "far-flung," militates against the ultimate finding that the partners knew about Treiger's

contacts with Hilltop. It is not at all clear what the court meant by "The company's method of doing business, of keeping the partners . . . informed." The only evidence of any method which the company had of keeping partners informed concerns the "reading files," to which the court made specific reference. Therefore, this finding comes down to an inference, based on the existence of the reading files, that some unidentified partner knew of and acquiesced in Treiger's concealment.

The reading file was a manila folder containing copies of letters and memoranda concerning the many jobs which Smith might be working on at any one time (Imus Tr. 737). Even if the partners routinely read such bulky and heterogeneous files, the inference would hardly be "inescapable" that some one of them had read the Hilltop materials. When one considers the fact that the partners rarely read these files, the inference becomes even more speculative. Even if a partner had read the file, he would have learned that, according to Petti, there was no conflict between Nutwood and Severance.

Orrico, whose professional activities were, by 1959, directed toward management of Winmar Realty Development Co., had virtually no direct contact with the consulting work of Larry Smith & Co. He merely attended partnership meetings, which were almost always held outside the offices of Larry Smith & Co.; he rarely visited the Smith offices, where the reading file was kept, and had not referred to the reading file "in the last few years"



(Tr., App. 137-41).

Arpke was also concentrating on activity with Winmar and no longer active in consulting work by 1959 (Tr., App. 144). Arpke testified that he worked in the Winmar offices, not the Larry Smith & Co. offices. His only contact with the consulting business was to attend partnership meetings (Tr., App. 144).

Larry Smith testified that his work kept him moving around the country, so that he maintained a home in Seattle and apartments in New York and Washington, D. C. (Tr. 2449-50). The Nutwood report had been prepared in the Washington, D. C. offices of Larry Smith & Co., but Smith stated that in his own Washington office, which was separate from the Eastern Division, he was not provided with correspondence or copies of reports, and that such materials were kept in the Eastern Division office (Tr. 2451-52).

It is obvious that any inference that the parties learned of Nutwood via the reading files is purely speculative. As Imus testified, the reading files were maintained for the "staff", not the partners (Tr. 737). Moreover, each of the three partners sought to be charged directly denied any notice of the existence of the Nutwood study through the reading files.

Orrico, the first of the partners to testify, was cross examined at length about the reading file, and denied having seen any of the material on Nutwood (Tr., App.

141-42). Cross examination of Arpke and Smith was more cursory, but equally destructive of any finding that the partners saw the Nutwood correspondence. Each denied having ever seen Exhibit 58-A, one of Hilltop's letters taken from the Seattle reading file (L. Smith Tr., App. 135-36, Arpke Tr., App. 145-46).

Thus, the finding that the partners knew of Treiger's activities is erroneous, as, of course, is the finding that they acquiesced therein. It is based neither on any evidence nor any reasonable inference from any evidence.

The court also found that:

“ . . . Treiger's attempts to justify and minimize the concealment at the meeting with Petti and O'Neill on August 10, 1960, in response to a written inquiry from Petti must have come to the attention of, or may even have been authorized by, one or more of the partners . . . ” (M.D., App. 13).

Exhibit 58-A, about which each of the partners was cross examined, is a copy of a letter from Hilltop's general counsel to Larry Smith & Co., attention Ray Treiger, dated October 20, 1960. This letter followed by two months, and was in part concerned with the meeting of August 10, 1960. If the partners had been aware of that meeting, they certainly would have read the correspondence which followed it, including Exhibit 58-A.

The court's finding that the partners were aware of Treiger's negotiations with Hilltop is contrary to the unchallenged testimony of those partners. In order to find knowledge and acquiescence, the court had to arbitrarily

reject uncontroverted evidence, which is clear error. *Joseph v. Donover Co.* 261 F.2d 812 (9th Cir. 1958); *Ariasi v. Orient Ins. Co.*, 50 F.2d 548 (9th Cir 1931).

**XII. Since the Partners Did Not Authorize, Ratify or Participate in Treiger's Actions, an Award of Punitive Damages Against Them is Improper. (Specification of Error No. 12)**

Virtually the entire judgment in this action consists of an award of punitive damages and attorneys' fees in favor of plaintiffs against five partners of Larry Smith & Co. While Ohio law recognizes vicarious liability for compensatory damages, personal involvement in or ratification of the tort by the person sought to be charged is essential to justify punitive damages. The judgment below is against five partners and their wives who had nothing whatever to do with the Nutwood report or the dealings with Hilltop. The judgment runs not against a partnership, but against individuals. In order for the punitive damage and attorney fee awards to stand, personal involvement of the individuals must be shown. The record is devoid of any such evidence.

The evidence of non-involvement may be briefly stated. Larry Smith first heard of Nutwood and Hilltop in late 1961 or 1962 (Tr., App. 133-35). Frank Orrico heard of them through Herb Spring sometime after the fall of 1960 (Tr., App. 138-39). Fred Arpke only learned of their existence when litigation had commenced or was threatened (Tr., App. 145).

York and McConnachie are judgment defendants only because they happen now to be partners in Larry Smith & Company. Neither was deposed. Neither was called to testify. The name of neither entered the testimony as having had any connection with the Nutwood study. Both filed affidavits in support of pretrial motions in which they swore that they never heard of Nutwood or Hilltop until after they were admitted to the partnership on August 1, 1960 (R. 19, 20).

When these facts are measured against the Ohio law regarding assessment of punitive damages against a principal for an agent's tort, it is apparent that the court erred in awarding such damages against appellants.

The general statement of the rule may be taken from *Tracy v. Athens & Pomeroy C. & L. Co.*, 115 Ohio St. 298, 152 N.E. 641, 642 (1926):

*"Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense . . .*

*". . . The employer cannot be punished for the personal guilt of his servant or agent, unless the employer authorized, ratified, or participated in the wrongdoing." (Emphasis added)*

In the *Tracy* case, the Supreme Court held that an instruction which imputed the misconduct of a mine superintendent to his employer was prejudicially erroneous since this instruction, coupled with the instruction

given on damages, allowed punitive damages to be assessed against the corporation without any showing of authorization, ratification or participation by the corporation.

A similar statement of the rule may be found in *Stockyards Bank v. Seal*, 27 Ohio App. 179, 161 N.E. 35, 36-37 (1927). In the *Stockyards Bank* case, the court held that the malice of the president of the defendant bank could not be imputed to the bank in the absence of ratification of the president's wrongful conduct. These two cases are noteworthy not only for their statement of the basic Ohio rule, but also for the fact that they involve conduct by an employee in a managerial position. Despite the wide authority that the agents possessed, the courts found that specific authorization, ratification or participation in the offense by the corporations was necessary to charge them with punitive damages.

There is good reason for imposing such a test on the award of punitive damages against a principal. Vicarious liability of any kind is harsh law, as is a doctrine of punitive damages. When the two may be combined, clearly great injustice may result unless the law requires that the principal have been closely involved in the alleged tort. In *Columbus Ry. P & L Co. v. Harrison*, 109 Ohio St. 526, 143 N.E. 32, 33 (1924), the court expressed this idea by quoting with approval from 2 Mechem on Agency, 2d Ed., Sec. 2014, as follows:



"If they [punitive damages] are to be awarded at all, it would seem that, however much they may be justified against the guilty servant or agent himself, they should not be awarded against the principal or master unless it can be shown that in some way he also has been guilty of the wrongful motives upon which such damages are based. It seems hard enough against an innocent principal or master that he should be compelled to pay compensatory damages for the wrongful act of his servant or agent, without adding thereto punishment for that of which he is in fact actually innocent and the cases which are believed to be the best considered have adopted this view."

In the present case, the partners knew nothing of Nutwood, so they certainly were innocent of any "wrongful motives".

The trial judge recognized the obvious problems in finding authorization by persons who knew nothing about the transaction in question. In his oral remarks at the close of trial he observed:

"I do not recall any evidence that any partner authorized the concealment or the misrepresentation with respect to Smith's true interest in Severance . . ." (O.O., App. 6).

In the first memorandum decision, where the findings on punitive damages are expressed, the court still did not find authorization *by the partners*. Instead, it found that fellow employees, Imus and Orndahl, authorized Treiger's conduct.

Imus' and Orndahl's authorization of Treiger's acts does not satisfy the Ohio test, which is that the *principal*

must authorize. Imus and Orndahl were not partners in 1959 and are not parties to the judgment. None of the appellants authorized Treiger to take the Nutwood job or to conceal information from Hilltop.

In his oral remarks at the close of trial, the judge stated:

"I am confident that there is evidence from which the court could find that the acts and omissions of Treiger were ratified by one or more of the partners, and I ask plaintiffs' counsel to call such evidence to the court's attention in the briefs to be presented."  
(O.O., App. 6)

The judge apparently did not recall any specific evidence, and with good reason, since there is none. In the memorandum decision, written after plaintiffs had filed lengthy briefs, the judge was still unable to point to a single item of evidence indicating ratification.

## CONCLUSION

The trial court's conclusions are not supported by its findings on evidence. The conclusion that employees of Smith were guilty of actual fraud is undermined by findings that they had no dishonest motive, no malice and no desire for pecuniary gain, and that plaintiffs, in any event, were not damaged by the alleged misconduct. The court took a case which, on its findings on evidence, might have supported conclusions of constructive fraud and nominal damages and, because of some mistaken but inflexible belief that the lawsuit was "caused" by



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**United States Court of Appeals  
For The Ninth Circuit**

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LARRY P. SMITH, ET AL.,

*Appellants,*

VS.

HILLTOP REALTY, INC., ET AL.,

*Appellees,*

HILLTOP REALTY, INC., ET AL.,

*Cross-Appellants,*

VS.

LARRY P. SMITH, ET AL.,

*Cross-Appellees,*

and

THE AUSTIN COMPANY,

*Additional Cross-Appellee as to Count No. 4 only.*

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***On Appeal from the Judgment of the  
United States District Court for the  
Western District of Washington***

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**APPENDIX TO**

**OPENING BRIEF OF LARRY P. SMITH, ET AL.,**

**FILED AS APPELLANTS**

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OCT 11 1966

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# APPENDIX TO APPELLANTS' OPENING BRIEF

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## **I. WRITTEN MEMORANDUM DECISIONS AND EXCERPTS FROM COURT'S ORAL REMARKS**

### **A. Tentative Oral Opinions of August 6, 1965 (Tr. 2565-2573, 2576-2579):**

THE COURT: The Court indicated to you yesterday that he would at this time make known to both parties his tentative thoughts in connection with the factual and legal issues presented in this case. In so doing the Court wants both parties to know that, with one exception, that I will mention later, the thoughts expressed today are tentative only, merely my impressions at this time, and not final in any respect. In other words, the Court poses the challenge to each of you of convincing me to the contrary.

This is the first time that I have done this. I don't know that it is a wise procedure, but I thought that in view of all of the evidence that has gone into this case thus far, it would be well to make my tentative impressions and thoughts known and let you concentrate on those in your briefs.

This case has been very well prepared by counsel on both sides. Both are to be commended for this. As a matter of fact, this is one of the most thorough and best-investigated cases that has come before me. This being so, there is a mass of exhibits as well as a great volume of testimony. The Court has not had the opportunity of examining all of the exhibits thoroughly or of weighing all the evidence carefully. It may very well be that he has overlooked or failed to give proper emphasis or failed to draw appropriate inferences from the evidence in giving you my tentative thoughts or impressions at this time. But as I say, I am putting the burden on each of you to establish to the contrary any thoughts that I express which are unfavorable at the present moment.



Now I think I will first discuss the cause of action predicated on fraud.

The relationship between Hilltop and Smith, that is, the nature of the service to be performed by Smith in its contractual undertaking with Hilltop, was such that it required a full disclosure by Smith to Hilltop of Smith's every interest in Severance. Nothing less would do.

Hilltop knew that Smith had performed services in connection with Severance. In fact, as I recall, the excellence of their performance at Severance was the motivating factor in the employment of Smith. Treiger and the others with whom he discussed or communicated about the situation may very well have thought that in originally revealing to plaintiffs that which Treiger did about Smith's relationship with Severance, Smith was making a sufficient disclosure of the conflict of interest which Smith knew to exist, but in this he was wrong. Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein, or to refuse the job.

I am satisfied that this concealment was originally and throughout the entire relationship between Smith and plaintiffs calculated, deliberate and intentional, as distinguished from inadvertent, accidental or misunderstanding. The Court is of the very definite opinion that the concealment in law amounted to constructive fraud. This is the exception to which I referred earlier.

The Court questions, however, that the concealment was prompted by any desire on the part of Smith to seek pecuniary gain at the expense of plaintiffs, or to cheat or defraud them in any way. I am for the present inclined to the view that the concealment was for the purpose of respecting the confidence of Austin. Such an intent, however, does not justify the concealment or

excuse what the law deems to be fraud. Furthermore, it is not to the credit of Smith that they took affirmative action to further conceal the true relationship with respect to Severance after plaintiffs became suspicious and asked for an explanation. Smith at all times proceeded on the theory that they had a choice between revealing all or only a part of their true relationship with Austin respecting Severance, but in law they had no choice. Smith's only alternative if it desired to respect the confidence of Austin was to decline the undertaking. The only choice which existed was that of plaintiffs to accept or reject Smith's employment after being fully informed of all of the facts.

Now, other than as stated, the Court expresses no views with respect to the contention of actual fraud at this time, although I think it only fair to state that I of the present belief that both Petti and O'Neill relied upon the report of Smith and upon the presentations made in connection with that report, and I am also of the present view that the Winslow sisters in turn relied upon the report by acting upon the recommendations of O'Neill, which were based upon the report.

Now a word about the cause of action based on contract. First of all, it is my present view that the Winslow sisters are not third party beneficiaries as that term is known in law, and hence, that they are not entitled to maintain an action on the contract between Hilltop and Smith.

The Court is of the view that in submitting the report to Petti, Exhibit 29, I mean, there was a contractual obligation on the part of Smith to reveal in the report the full nature of their interest in Severance, and the failure to do so was a breach of the contract. I may be wrong, but that is my present view. In other respects in which it is contended that the contract was

breached, the Court is presently of an open mind. That is, I have no thoughts one way or the other.

Next, I would like to say a few words about the defense of the statute of limitations which is contended by Smith as to the additional or added defendants made parties in the amended complaint lodged with this Court on July 20, 1964. The Court previously held in a memorandum decision dated March 29, 1965 that I could not hold as a matter of law that the cause of action as to the additional defendants was time-barred, and such holding had the effect of postponing the decision on this question until the time of trial.

The critical questions posed are whether the plaintiffs exercised due diligence for the period commencing on or about February 16, 1961, following the meeting in Cleveland with Treiger, and the critical date of on or about July 21, 1961 — I am not sure of these dates, gentlemen, I have not taken the trouble to look them up definitely — and also whether certain of the defendants are estopped to assert the statute of limitations.

I think I am prepared to find that the plaintiffs at the meeting in Cleveland on February 16, 1961, I think that is the correct date, were lulled into a position of false security by the representations made by Treiger at that meeting. As the Court recalls, there is no evidence of what the plaintiffs did in this respect during the approximate five-month period following the meeting, or at any time thereafter up until the original action was filed. Some time between February 15, 1961 and January 4, 1963, when the original complaint was filed, the plaintiffs apparently became suspicious or sufficiently dissatisfied with the representations made by Treiger that they consulted counsel, which resulted in the original filing of this action. But insofar as I recall, there is no evidence of when such occurred.

I therefore pose this question: May I on the evidence now before me conclude that the plaintiffs were justified in waiting until after approximately July 20, 1961 before instituting action against the added defendants?

On the other phase of this question, it was brought to the Court's attention at the time the dismissal as to the additional defendants based upon the statute of limitations was presented that some of the defendants, Eberhart, Kelly and Steichen, I believe, had failed to comply with the assumed business name law in the State of Washington, that plaintiffs had no knowledge of their interest in the partnership, and that because of such failure the plaintiffs were prejudiced. At this moment I do not recall the exact dates that these three partners became such, but assuming *arguendo* plaintiffs' contentions to be proved, the Court does not recall any evidence presented during the trial of this case from which it can find prejudice. Accordingly, unless there is such evidence, and I ask plaintiffs' counsel to call it to my attention in their brief, I must hold that the three mentioned defendants are not estopped to assert the statute of limitations.

The Court now comes to what he considers the critical question in this case, namely, damages, both of a compensatory and of a punitive or exemplary nature.

Both sides have produced reputable and outstanding experts both in the field of economic analysis of regional shopping center developments and on the subject of value. I have given a lot of thought to this subject, but I have not yet examined all of the evidence critically with respect thereto. I must say, however, that at this moment I am not convinced that Nutwood Farms had a potential as a regional shopping center, or put in another way, that its highest and best use was for such a purpose, or that it had the value which plaintiffs contend.

In other words, Counsel, what I am trying to say is that I entertain doubt that the property had any greater value than the price obtained from the Harry Ratner interests, I believe they were, Ridge Hills Development Company. I believe it was called. Plaintiffs' counsel may be able to convince me to the contrary, but assuming they do not, I take this opportunity of posing a further problem: I think there is little doubt but that Hilltop has been damaged in the amount that it paid Smith, approximately \$2,900.00, I believe, for a report which was in law worthless because of the concealment. Should Hilltop be awarded such damages and in addition thereto, punitive damages? That is the question I pose. Also in the absence of a finding of actual damage as to the Winslow sisters may the Court award nominal damages, and if so, may I and should I award punitive damages in addition? Also, should punitive damages, if awarded, include reasonable attorneys' fee for all or part of the work done by plaintiffs' counsel?

In the event the Court should allow punitive damages, a further and additional problem is presented: Against whom should the judgment run?

I do not recall evidence that any partner authorized the concealment or the misrepresentations with respect to Smith's true interest in Severance, but I am confident that there is evidence from which the Court could find that the acts and omissions of Treiger were ratified by one or more of the partners, and I ask plaintiffs' counsel to call such evidence to the Court's attention in the briefs to be presented.

\* \* \*

MR. STEPHAN: Yes, your Honor, all right. There is only one problem, it is a legal problem, we think most of it is factual that we can marshal. There was filed with the Court, but I don't know whether it has come



to the Court's attention yet, a brief, and we haven't seen any answer to it, which we thought very clearly established under Ohio law that under the facts here the Winslow sisters were clearly third party beneficiaries.

THE COURT: I saw that, and I don't think I agree with you.

MR. STEPHAN: All right.

MR. WHITE: We have a brief on that, your Honor, but until we heard your remarks we didn't know whether to file it. There is at least one additional case in Ohio which, at least under our interpretation, makes it very clear that they are not.

MR. STEPHAN: It would be very helpful to have your brief.

THE COURT: Ohio law is not very much different from the Washington law or the general rule. I will concede that they were an incidental beneficiary, but I don't believe they reached the status of being third party beneficiaries.

No, as I view this, except with respect to some of the phases of exemplary damages I think this is pretty largely factual and that the third party beneficiary is a legal question, but I suggest that you not spend too much time on that because my mind is pretty well resolved on that phase of it, right or wrong.

On the statute of limitations, there is no legal question, it is factual and what there is in the testimony that is before me in the case.

MR. WHITE: As I indicated earlier, your Honor, one of the serious legal questions, at least in our minds, and I have discussed this to some extent with Mr. Stephan and given him citations, is the matter of the Ninth Cir-

cuit rule that an expert witness as to value may not consider events occurring after the —

THE COURT: I am quite well aware of the rule on which you rely, and you may very well be right, but what I want you to do is to point out in your brief those portions which you think violate the rule.

MR. WHITE: I will do that.

THE COURT: I was conveying, however, to you my impressions with the testimony concluded, my present impressions, but maybe you can convince me to the contrary. I thought it would be well for you to know where to put your emphasis.

MR. STEPHAN: Oh, it is very helpful, your Honor, it is very helpful. We will work on it at once.

THE COURT: I may have vacillated from time to time with respect to Mr. Petti's reliance, but after considering it fully I am of the present view that he relied, although you may convince me that I am wrong.

MR. WHITE: We are sure going to try, anyway.

THE COURT: A good real estate man never gives up. I am satisfied in my own mind from the immediate actions following the report that he did, but you may convince me to the contrary.

MR. STEPHAN: We realize the great mass of economic data and we are going to address ourselves primarily to the factual issue of the desirability of the property for a regional shopping center as we understand it.

THE COURT: And now another thing I didn't mention where you might in connection with actual fraud concentrate, try to point out to me from the evidence a motive on the part of Smith, where they stood to gain or profit. It would be easy, of course, if they themselves had bought the property or arranged with someone in

their own organization to purchase the property, but it is hard for me at this moment to see a motive of pecuniary gain.

MR. STEPHAN: We believe, your Honor, from the evidence that we can very clearly establish that.

THE COURT: Or as to constructive fraud, if it was something that naturally flowed from the other whether they had the motive or not, is another factor. But I have given you as far as my tentative thinking has gone.

**B. Written Memorandum Decision of October 27, 1965  
(Tr. 2770-2777):**

At the time this matter was submitted to the Court for decision it was agreed that the question of oral argument would be deferred until after the Court had read the posttrial briefs. It was also agreed between counsel at an early stage in the proceedings, which agreement was acquiesced in by the Court, that if the Court deemed it helpful to a decision in this case the Court would visit Cleveland for the purpose of viewing the area in dispute. Inasmuch as counsel have been so diligent, competent and thorough in the presentation of testimony and in the preparation of posttrial briefs, the Court does not believe that oral argument or a view of the premises would be of material assistance in the decision of the case. Accordingly, the time has come when the Court must render a decision in this long and hard fought case. Whether this decision will constitute a terminus or merely a milestone in this lengthy litigation the Court can only speculate. Suffice it to say that the Court recognizes and appreciates the diligent efforts which counsel have thus far expended on behalf of their respective clients and in clarifying the issues for the Court. The case has been well tried and counsel

have given their clients the benefit of every reasonable argument and shred of evidence.

The Court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error, but *the plaintiffs relied on the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills.* However, } Spec. 1  
 assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the Court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. The Court does not accept the opinions of the land value experts on either side of the controversy, and inasmuch as plaintiffs have failed to sustain their burden of proof the issue must be resolved in favor of the defendants. Defendants' principal expert based his conclusion upon what the Court believes to be an erroneous premise and the opinion of plaintiffs' expert is predicated somewhat on hindsight, information not available at the time of, or prior to, the sale of Nutwood, and comparable sales which the Court cannot accept as probative of the value of Nutwood. It therefore becomes unnecessary for the Court to pass on defendants' posttrial motions to strike the testimony of Mr. Fenton and Mrs. Tyler.

The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice.

The cause of action for the fraudulent concealment of Larry Smith & Company's proprietary interest in the Severance Center arose when the market analysis report on Nutwood was delivered to the plaintiffs in January of 1960. At this point in time the defendants Imus, Orndahl, Kelly, Eberhart and Steichen were neither partners in Larry Smith & Company nor residents of the State of Washington, and were served with process outside of the State under the Washington "long arm" statute, RCW 4.28.185, and F.R.Civ. P. 4(e). However, it appears that the only possible basis of service under the long arm statute is if the fraud arose out of the transaction of business within the State. Since the fraud occurred before these defendants became partners, there appears to be no way in which their alleged participation in the fraud could have arisen out of their transaction of business within the State of Washington. Accordingly, the service of process upon them was ineffectual and the fraud cause of action will be dismissed as to them without prejudice.

*The Court finds that the remaining defendants are liable for actual fraud committed by Larry Smith & Company in concealing from Hilltop the fact that Smith was then conducting negotiations to acquire an interest in the Severance property. Such concealment was material to plaintiffs' course of conduct and caused plaintiffs to falsely believe that Smith was no more than a consultant on the Severance development, which belief was knowingly and intentionally fostered by Larry Smith & Company. Hilltop relied on such belief in selecting Smith to produce a market analysis and all plaintiffs relied thereon in determining their course of conduct after the negative report*

Spec. 1



*was received. By the very nature of the relationship between the parties, the plaintiffs had a right to rely on an absence of such a conflict of interest on the part of one from whom expert advice was sought. Inasmuch as the concealment of the conflict of interest made the Nutwood report totally untrustworthy, the plaintiffs also suffered financial injury as a proximate consequence of the concealment. Plaintiff Hilltop was damaged in the amount of the price it paid for the market analysis and the plaintiff sisters were knowingly deprived of the benefit of their contract with Hilltop whereby Hilltop obligated itself to procure the analysis for their benefit. Although the*

Spec. 4

*Court cannot from the evidence ascertain what value a reliable market analysis had to the sisters, it does find that it did have some definite value. Thus, the Court concludes that all eight elements of fraud under Ohio law have been proven by clear, cogent and convincing evidence. Plaintiff Hilltop is entitled to recover the amount it paid for the market analysis and the plaintiff sisters are entitled to a recovery of \$100.00 as nominal damages.*

Spec. 1

Spec. 2  
and 3

*The Court has carefully reviewed the Ohio authorities and has concluded that this case is an appropriate one for the award of punitive damages. The decisions of the Ohio courts clearly demonstrate that punitive damages are recoverable in a case such as this where "the defendant's conduct shows a wanton or reckless disregard of the legal rights of others . . ." Saberton v. Greenwald, 66 N.E.2d 224, 229 (Ohio 1946), quoting from 13*

Spec.  
5(b)

Spec. 7

Ohio Jur. § 137; *Scars v. Holly*, 178 N.E.2d 91 (Ohio Ct. App. 1960); see *Waters v. Novak*, 115 N.E.2d 420 (Ohio Ct. App. 1953). *The Court has also concluded that the case of Schumacher v. Seifert*, 172 N.E. 420 (Ohio Ct. App. 1930), *authorizes an award of punitive damages where, as here, actual though nominal damage is found.*

Spec. 6

The Court further finds that the fraudulent concealment by Treiger of Smith's prospective proprietary interest in Severance was authorized by the defendant Orndahl, then the manager of the New York office, and by defendant Innus, then the manager of Smith's Eastern Division, and that such acts of authorization were within the scope of their respective employments by Larry Smith & Company. *CF. M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ohio Ct. App. 1929). Furthermore, *the concealment was not only calculated, deliberate, and intentional, it was done pursuant to company policy, as defendants so clearly demonstrate in their posttrial brief (Sec. XIII, pp. 99 et seq.). The company's method of doing business, of keeping the partners in its far-flung organization informed, and its system of reading files make the inference inescapable that one or more of the partners was aware of the concealment and at least acquiesced therein. Furthermore, Treiger's attempts to justify and minimize the concealment at the meeting with Petti and O'Neill on August 10, 1960, in response to a written inquiry from Petti must have come to the attention of, or may even have been authorized by, one or more of the partners. Any one of these factors standing alone would be sufficient basis for the Court's find-*

Spec. 11  
and 12

*ing that the fraudulent concealment is chargeable to the partnership, and the partners who were originally made defendants are jointly and severally liable for actual and punitive damages. RCW 25.04.130, .150(1).*

All that remains is to fix the amount of punitive damages and this is a subject to which the Court has given a great deal of thought. *Larry Smith & Company willfully concealed the conflict of interest and when the plaintiffs became suspicious of the conflict their investigations logically turned to the substance of the Smith market analysis and substantiating report. The mistakes, errors and examples of unprofessional workmanship which they therein found and subsequently continued to find, together with the concealed conflict of interest and other suspicious circumstances which they discovered, fully justified the prosecution of this legal action. Although the plaintiffs have been unable to prove all of their suspicions, they have proved to the Court's satisfaction that their expenses in this lawsuit are a result of the defendants' fraud. The Court, therefore, proposes to fix punitive damages, and he has in mind, as a minimum, such amount as will reimburse plaintiffs' expenses in the prosecution of this action and also the possible award of an attorney fee as is authorized by the law of Ohio. Davis v. Tunison, 155 N.E.2d 904 (Ohio 1959).*

Spec. 9  
and 10

The Court desires to confer with counsel preparatory to a further hearing on the exemplary damage issue

and such conference is set for November 8, 1965 at 11:00 a.m.

DATED this 27 day of October, 1965.

(s) W. T. BEEKS  
United States District Judge

**C. Court's Remarks at Oral Argument on April 22, 1966 (R. 2134-2135):**

THE COURT: . . . I did find that and I stand by that. I think it is a deliberate, wanton concealment in complete disregard of the rights of the plaintiffs in order to serve Smith's own ends in what they conceived to be their understanding and their duty with The Austin Company, but at the same time I am sure that they did not do it for direct financial profit in connection with the Severance project. They did it in connection with Austin Company's good will, there is no question about that, to retain that.

MR. STEPHAN: We briefed that phase, your Honor, and I won't labor our view.

THE COURT: Well, that has been my feeling all along on that particular phase of it. But it was deliberate and intentional, there is no doubt about it.

**D. Final Written Memorandum Decision of May 2, 1966 (Tr. 2777-2791):**

Defendants have sua sponte filed a brief raising issues of law relative to punitive damages which the Court thought had been decided and laid to rest long ago. However, because of additional authorities cited therein the Court permitted defendants' counsel to argue these issues orally at the hearing which was originally set for argument solely of factual issues re punitive damages. As a result of defendants' argu-

ments, the Court has undertaken a complete review of the applicable law, the evidence and its prior decisions.

As a result of such review the Court has decided to amend its prior decision in one particular. Defendants contend that the terms "actual damages" and "nominal damages," as used by the Ohio courts, are mutually exclusive and that nominal damages will not under Ohio law support an award of punitive damages. In the memorandum decision of October 27, 1965, the Court found that the sisters had been knowingly deprived by the defendants of the benefit of the contract which the sisters made with Hilltop, by which Hilltop obligated itself to procure a market analysis of Nutwood for the sisters' benefit. The Court found that a reliable market analysis did have a definite but undeterminable pecuniary value to the sisters and the Court therefore awarded them \$100.00 "as nominal damages." By this the Court meant, as is clear from the context, compensatory damages, though nominal in amount. On review of the evidence in the case, however, *the Court has concluded that there is sufficient evidence in the record to support a finding that the fair market value to the sisters of a reliable and trustworthy Nutwood market analysis was at least equal to the price which Larry Smith & Co. billed Hilltop for their analysis, or \$2,920.00.* The memorandum decision of October 27, 1965, is herewith amended accordingly.

Spec. 2  
and 3

Defendants have asserted that under the contract between Hilltop and the sisters, Hilltop had no obligation to provide a market analysis. Defendants contend that the contract was in effect the grant of an option to Hilltop for an exclusive listing of Nutwood predicated upon Hilltop accomplishing two of five enumerated objectives, one of which was the procurement of a market



analysis of the Nutwood property. Although the defendants may be correct as to the nature of the contract, *when Hilltop exercised the option by undertaking to provide a market analysis of the Nutwood property it became obligated to provide a reliable and trustworthy market analysis. Hilltop did in fact provide a market analysis, which was rendered totally unreliable and highly suspect by the subsequent discovery of Smith's tortiously concealed pre-existing conflict of interest. This, together with errors in the Smith market analysis, the delivery of a "substantiating report" which also was not free from error, the competitive positions of Nutwood and Severance and other suspicious circumstances, fully justified the prosecution of the fraud and breach of contract counts of this suit. The Court also believes that the anti-trust counts were justified up to a point which the Court need not determine. Thus, Smith fully performed its contract, in spite of what later proved to be inconsequential errors in its report. However, Smith not only rendered its own product, the very object of the contract, totally worthless by its fraud, it also deliberately withheld information, the disclosure of which in all probability would have rendered this expensive lawsuit unnecessary. In the Court's view these facts amply justify an award of punitive damages in an amount sufficient to compensate plaintiffs for the expenses of this lawsuit, if the law of Ohio permits the imposition of such damages.*

Spec. 4

Spec. 9  
and 10Spec. 9  
and 10

The argument of the defendants is that Ohio law requires a showing of actual malice, *i.e.*, "ill will or

hatred," before punitive damages may be awarded. The Court has expressly found that the defendants' conduct was not so motivated. Defendants rely on the five<sup>1</sup> most recent punitive damage decisions of the Ohio Supreme Court as demonstrating a transformation in the relevant law which has not been explicitly expressed by the Ohio Court, but which nevertheless overrules sub silentio the Ohio opinions relied upon by this Court in its prior memorandum decision for its holding that it was enough to award punitive damages under Ohio law that plaintiffs have shown that defendants willfully and deliberately committed a fraud on the plaintiffs in wanton disregard of plaintiffs' rights.

The Court based its conclusion on two Ohio cases, *Saberton v. Greenwald*, 66 N.E.2d 224 (1946) and *Sears v. Holly*, 170 N.E.2d 91 (Ohio Ct. App. 1960).

In *Saberton v. Greenwald*, *supra*, the defendant jeweler sold plaintiff a wristwatch, representing it as a new watch, when in fact it was a twenty- to twenty-five-year-old watchworks in a new case. The watch cost about \$20.00 new, but was sold to plaintiff for \$38.15. Defendant had refused to rescind the transaction when plaintiff discovered the true age of the watch. The trial court had refused to instruct on the issue of punitive damages. The Court of Appeals affirmed, but the Supreme Court reversed, holding that the case was a proper one for the award of punitive damages, since it was an action for "a tort which involves the ingredients of *fraud*, *malice* or *insult*." 66 N.E.2d 224 (Syllabus No. 2) (emphasis added). The Court also quoted with approval from 13 Ohio Jur. § 139 a statement that Ohio law permits recovery of punitive damages if "the

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<sup>1</sup>*Saberton v. Greenwald*, 66 N.E.2d 224 (1946); *Smithhisler v. Dutter*, 105 N.E.2d 868 (1952); *Davis v. Tunison*, 155 N.E.2d 904 (1959); *Rogers v. Barbara*, 164 N.E.2d 162 (1960); *Pickle v. Swinehart*, 166 N.E.2d 227 (1960).

wrong complained of involves ingredients of *fraud*, *malice*, or *insult*, or a *wanton and reckless disregard of plaintiffs' rights*." 66 N.E.2d at 230 (emphasis added). Certainly from the facts in the *Saberton* case it cannot be said that the defendant's fraudulent conduct was motivated by "ill will or hatred" toward the plaintiff.

Defendant, however, contends that the case of *Smithhisler v. Dutter*, 105 N.E.2d 868 (1952), marked the beginning of a judicial transformation of Ohio law on the question of punitive damages. Indeed, the syllabus by the court does state, "In tort actions, the question of punitive damages may not ordinarily be submitted to a jury in the absence of actual malice." 105 N.E.2d at 868. However, this was an action for alienation of affection. Obviously punitive damages could not in such an action be based on fraud and the only question on appeal was whether implied malice would justify an award of punitive damages. The court affirmed the two lower courts, holding that implied malice was sufficient. This Court is of the opinion that the proper construction of this holding is that for public policy reasons, *in an action for alienation of affections*, implied malice is sufficient, although in other tort actions actual malice would ordinarily be required, *if malice* (not fraud or insult) is the basis on which punitive damages are sought. This is the only construction which is consistent with the Ohio Court's quotation of the second syllabus of *Saberton* and its statement, "The rule in Ohio seems to be that ordinarily, in tort actions, punitive damages are allowable in cases in which *fraud*, *malice or insult* appears. . . ." 105 N.E.2d at 871 (emphasis added). Thus, the *Smithhisler* case represents an exception to the ordinary rule.

The next case cited by defendants which supposedly illustrates the "judicial trend" toward requiring "ill will or hatred" is *Davis v. Tunison*, 155 N.E.2d 904

(1959). The *Tunison* case was an action for malicious prosecution by the payee of a check, who had been charged by defendant with using the check to obtain money by means of false pretenses and with intent to defraud. Plaintiff had refused to honor the check on the ground that the plaintiff's signature had been forged thereon. Defendant filed the charges after being advised by a handwriting expert that the signature on the check was in fact that of the plaintiff. Although a justice of the peace bound the plaintiff over to the grand jury, the grand jury returned a "no bill." Defendants rely on Syllabus No. 1 by the Ohio Supreme Court, "In an action for malicious prosecution, actual malice must be shown in order to justify an award of punitive damages." This, they contend, requires a showing of actual malice in every case where punitive damages are sought. This Court, however, holds, for reasons which follow, that the *Tunison* rule is restricted to actions for malicious prosecution. First of all, as in *Smithhisler*, fraud was not claimed as a basis for an award of punitive damages. Secondly, Syllabus No. 2 by the Court would allow punitive damages even in malicious prosecution actions if the prosecution is instigated "Wantonly, recklessly, and without justification." Thirdly, the Court stated at 155 N.E.2d 906, 907:

"(I)n order to justify a jury in awarding punitive damages within its discretion, there must be the ingredient of *fraud*, malice or insult . . .

"We are of the opinion that, before the question of punitive damages may be submitted to a jury, the *fraud*, malice, or insult connected with the tort must be actual and not imaginative." (Emphasis added).

Finally, after noting that implied malice was found to be sufficient in the *Smithhisler* case, the Court went on to find that actual malice, not implied malice, was required in an action for malicious prosecution. "Other-



wise, there would be too great an inhibition upon the part of people to originate a prosecution for crime, and, in many cases, justice would be defeated because of a fear of the risk in exposing a crime." 155 N.E.2d at 907. Thus the effect of the *Tunison* case is merely a refusal by the Ohio Supreme Court for reasons of public policy to extend the exception made in *Smithhisler* to actions for malicious prosecution. The *Tunison* case clearly leaves the normal rule unaltered, i.e., that punitive damages may be based on "fraud, malice or insult." Any confusion arising from *Tunison* results from the fact that, as in *Smithhisler*, by the very nature of the cause of action asserted, malice was the sole basis upon which punitive damages could be predicated and hence the Court framed its syllabi solely in terms of malice.

The other two cases cited by defendants as part of the supposed "trend" are *Rogers v. Barbara*, 164 N.E.2d 162 (1960), and *Pickle v. Swinchart*, 166 N.E.2d 227 (1960). Both were actions for malicious prosecution and, notwithstanding defendants' contentions, the Court believes they basically do no more than repeat the rule of the *Tunison* case. It is true that *Rogers* overruled *Tunison* to the extent that *Tunison* would have allowed punitive damages, in an action for malicious prosecution, for a prosecution instigated "wantonly, recklessly, and without justification." The reason given is that the very elements of an action for malicious prosecution require more than wantonness or recklessness. As the Court stated, quoting from 22 Am. Jur., *False Imprisonment*, §§ 2, 3, "In the case of malicious prosecution . . . the gist of the cause of action is malice or evil intent" (emphasis by the Court). In essence, the Court was saying that if the gist of a cause of action is "malice or evil intent," how can the standard for awarding punitive damages in such an action be anything less?

*Pickle v. Swinchart, supra*, merely held that "legal malice" is not synonymous with "actual malice" and is insufficient for an award of punitive damages *in an action for malicious prosecution*.

In spite of the diligent efforts of defendants' counsel in expounding the law of Ohio, the fact remains that the *Saberton* case is the most recent decision of the Ohio Supreme Court construing the Ohio law of punitive damages where fraud is claimed as the basis for such damages. It has never been disapproved or overruled. *Saberton clearly allows punitive damages in such a case without a showing of "ill will or hatred."*<sup>2</sup> } Spec. 7

Furthermore, there is the intermediate appellate court decision of *Scars v. Holly*, 178 N.E.2d 91 (Ohio Ct. App. 1960), which was decided after all of the above cases relied upon by defendants. Plaintiff there alleged fraud in the sale of an automobile. The Court held that mere fraud was not sufficient for an award of punitive damages, but that "extreme and exceptional conduct" is required. The Court also cited prior Ohio cases which required "a gross or malicious fraud or something showing a very corrupt condition of affairs," and that the defendant's wrongdoing must be "intentional and deliberate, or have the character of outrage frequently associated with crime." 178 N.E.2d at 92. *The defendants in the case at bar were certainly guilty of "extreme and exceptional conduct" constituting a "gross fraud" which was "intentional and deliberate."* } Spec. 5(b)

Another case more recent than those relied upon by defendants is *Nagel v. Prescott & Co.*, 36 F.R.D. 445

<sup>2</sup> Defendants also cite *New York, C. & S.L.R. Co. v. Grodek*, 186 N.E. 733 (1933). To the extent it is inconsistent with *Saberton* the latter must obviously control.



(N.D. Ohio 1964). Chief Judge Connel said, "Under Ohio law, in an action to recover damages for a tort which involves the ingredient of *fraud or malice*, a jury may go beyond the mere rule of compensation to the party aggrieved and award exemplary damages." 36 F.R.D. at 449 (emphasis added). The Court cited *Saberton* and quoted from *Smithhisler* the same statement at 105 N.E.2d 871 which is quoted herein at page 5, *supra*.

Defendants quote language from the *Waters* case in their favor, but the facts of the case do not sustain their position. Furthermore, to the extent there is any language in the *Waters* or *Scars* cases which is inconsistent with this Court's interpretation of Ohio law, its precedential value is negated by the more recent expression of Ohio law of the intermediate appellate court in *Levin v. Elyria Sign Co.*, 206 N.E.2d 38 (Ohio Ct. App. 1965). That court held that an award of punitive damages must be predicated upon "*malice, fraud, intentional wrongdoing or other outrageous conduct of a similar nature.*" 206 N.E.2d at 39 (emphasis added). The Court cited *Saberton*, *Smithhisler* and *Tunison*.

Defendants' brief also attempted to show that Ohio follows the "ratio rule" of punitive damages and, by reference to other jurisdictions, that such ratio may not exceed approximately 20 to 1. However, as plaintiffs' counsel pointed out on oral argument, the Ohio Supreme Court in *Saberton* allowed plaintiff an opportunity to recover \$5,000 punitive damages where compensatory damages were only \$38.15. This is a ratio in excess of 128 to 1.

Spec. 8

The final argument of defendants to be considered is the contention that inasmuch as under Ohio law attorney fees in an action such as this are classed as com-

pensatory damages (even though predicated upon circumstances justifying an award of punitive damages), attorney fees can be awarded only to reimburse plaintiffs' actual out-of-pocket expenses for attorney fees and may not be awarded where, as here, the attorney is retained on a contingent fee basis. Defendants cite no Ohio cases which are directly in point. In fact, the only direct authority cited is 25 C.J.S., *Damages*, §50(d). However, the sole authority cited by C.J.S. is *Houston & T.R. Co. v. Oram*, 49 Tex. 341. One case from one state can hardly be said to establish a general rule.

If the rule contended by defendants were to be upheld it would result in an unwarranted windfall to undeserving defendants and would unjustly penalize attorneys who in good faith accepted employment on a contingency basis. Such a rule would run counter to the very policy reasons which have induced the courts to recognize contingency agreements. *Grushak v. Simcenauskas*, 140 Atl. 724 (Conn. 1928).

Furthermore, under defendants' theory, if the award of attorney fees were strictly compensatory the award would be based on the *actual* attorney fee and not on a *reasonable* attorney fee. However, it is not only the practice of Ohio trial courts in such cases to instruct in terms of a "reasonable" attorney fee, *Scars v. Holly*, 178 N.E.2d 91 (Ct. App. 1960); *Davis v. Tunison*, 155 N.E.2d 904 (1959); *Housh v. Peth*, 133 N.E.2d 340 (1956); *Waters v. Novak*, 155 N.E.2d 420 (Ct. App. 1953); *Smithhisler v. Dutler*, 105 N.E.2d 868 (1952); *Columbus Ry. Power & Light Co. v. Harrison*, 143 N.E. 32 (1924); *United Power Co. v. Matheny*, 90 N.E. 154 (1909); the Ohio appellate courts have specifically stated that the applicable standard is a "reasonable" attorney fee. *Smithhisler v. Dutler*, *supra*; *M. J. Rose Co. v. Lowery*, 169 N.E. 716 (Ct. App. 1929); *United Power Co. v. Matheny*, *supra*; *Finney v. Smith*, 31

Ohio St. 529, 27 Am. Rep. 524 (1877); *Roberts v. Mason*, 10 Ohio St. 277 (1859).

Also, if, as defendants contend, attorney fees were strictly compensatory Ohio law would necessarily require the admission of evidence of the amount of the actual attorney fee in every case where such a fee was claimed. The Ohio rule, however, has been to the contrary for over one hundred years. In *Roberts v. Mason*, 10 Ohio St. 277, 282 (1859), the Court said, "No evidence in this case appears to have been given to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received." The Court nevertheless held that "the jury, which has the power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages." The rule of *Roberts v. Mason* is patently inconsistent with the rule contended for by defendants. It would therefore appear that if this Court has committed error, such error was in taking note of plaintiffs' contingent fee agreement in the first place. This is not an error of which defendants may complain.

<p><i>The Court therefore finds that plaintiff Hilltop Realty, Inc. shall recover \$2,920.00 as compensatory damages and that the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell shall jointly recover a like amount. The Court also awards to plaintiff Hilltop Realty, Inc. punitive damages in the amount of \$40,000.00 and to the plaintiffs Mildred Winslow Ashcraft and Aileen D. Winslow Powell jointly punitive damages in the sum of \$35,000.00. Such</i></p>	<p>Spec. 2 and 3</p> <p>Spec. 5 and 10</p>
<p>award is conditioned upon plaintiffs filing of a waiver</p>	

of any claim to costs in this action. *The Court awards jointly to Hilltop Realty, Inc., Mildred Winslow Ashcraft and Aileen D. Winslow Powell the sum of \$75,000.00 as a reasonable attorney fee.* Such a fee will not adequately compensate plaintiffs' counsel for all of the time they have devoted to this case but the Court believes, considering all the circumstances, that such an amount is reasonable. } Spec. 10

This memorandum decision, together with the prior memorandum decision of October 27, 1965, insofar as it has not been modified by this decision, shall serve as findings of fact and conclusions of law. Counsel for plaintiffs may present a form of judgment to the Court on May 6, 1966, at 9:30 a.m.

DATED this 2nd day of May, 1966.

(s) W. T. BEEKS

United States District Judge

## II. EXCERPTS FROM ADMITTED FACTS SECTION OF PRETRIAL ORDER (R. 1054-1265)\*

1. Plaintiff Hilltop Realty, Inc., hereinafter called Hilltop, at all times material hereto was and is now a corporation incorporated under the laws of Ohio with its sole office at Lyndhurst, Ohio, an eastern suburb of Cleveland, except that it had an office in Willoughby, Ohio, another eastern suburb of Cleveland, from 1961 to early 1963. Hilltop was engaged in the sale of real estate, primarily residential, in the eastern suburbs of Cleveland. Henry Petti was president of Hilltop. . . .

2. Plaintiff Mildred Winslow Ashcraft was married to Edwin W. Ashcraft in June, 1962. At all times material hereto she has been a resident of Washington, D.C.

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\*References in said admitted facts to sources thereof, in the pre-trial record, i.e., to depositions or exhibits, have been deleted.

3. Plaintiff Aileen D. Winslow Powell, a widow, is a sister of Mrs. Ashcraft. She is now and was at all times herein mentioned a resident of St. Thomas, Virgin Islands. The sisters are very close. Mrs. Ashcraft resided in Washington, D.C., and Mrs. Powell resided in the Virgin Islands during the years when Hilltop acted as real estate broker for them. The sisters made occasional trips to Cleveland during the period and conferred with Mr. O'Neill.

4. In 1951, Mrs. Ashcraft and Mrs. Powell inherited from their widowed mother the family's country estate known as Nutwood Farm. The estate, which consisted of 238 acres, was still actively farmed. . . . Neither Mrs. Ashcraft nor Mrs. Powell has had any experience or interest in the real estate field or in the shopping center industry. . . . In 1955 the sisters sold 54 acres of Nutwood, including the residence and farm buildings, to the College of Telsche, for \$230,000.00. This was done on the advice of Wilbert J. O'Neill, their family legal and business advisor. In the same year they sold 1.06 acres for \$15,000.00.

5. The portion of Nutwood Farms remaining after the foregoing sales consisted of 175.189 acres. On April 29, 1960, the sisters sold Nutwood to the Ridge Hills Development Company for \$613,161.00. They now have no interest in the property. In January, 1961, the State of Ohio acquired from Ridge Hills Development Company, for highway purposes, approximately 26 acres for about \$190,000, for construction of the Euclid Spur which has now been constructed to connect Ohio State Route 1 (North-South Freeway) with the Lakeland Freeway. Neither the Euclid Spur nor either of these two freeways had been constructed at the time of the sale to Ridge Hills Development Company on April 29, 1960, though the Ohio State Highway Department esti-



mated that the Euclid Spur would be open to traffic by the end of 1962.

6(a). Nutwood was located partly in Wickliffe, Willoughby Hills and Euclid until about January, 1961, when the portion in the City of Euclid was taken by the State of Ohio for highway purposes. Nutwood was located in the eastern suburbs of Cleveland, Ohio, at the northwest corner of the intersection of Chardon Road (U.S. Highway 6) and Bishop Road (Ohio State Highway 84) in western Lake County, about fourteen straight line miles northeast of downtown Cleveland. A portion of the property extended north as far as Euclid Avenue (U.S. Highway 20). It now adjoins the Euclid Spur, Interstate 90, and its Bishop Road interchange.

(b) During the entire period from 1955 to 1959, both Severance and Nutwood Farms continued to be unimproved acreages, except for a family residence and related buildings on each. . . .

7. At all times material hereto defendant Larry Smith & Company, herein termed "Smith," was a real estate consultant with its home office in Seattle, Washington, and branch offices in Washington, D.C., New York, Chicago and elsewhere.

\* \* \*

9. Defendant Larry Smith & Company is a partnership now consisting of eight defendant partners, namely, Larry Smith, Frank A. Orrico and Ian McConnachie, Washington residents; Harold R. Imus, a Maryland resident; F. Keith Kelly and James O. York, California residents; C. Everett Steichen and C. Ake Orndahl, residents of New York. Robert J. Crabb withdrew as a member of the partnership some time prior to 1959. Frederick C. Arpke, a Washington resident, withdrew from the partnership as of April 1, 1962, and Dee R.



Eberhart, a California resident, withdrew as of June 1, 1965. McConnachie, Orndahl, Imus and York became partners as of August 1, 1960. Kelly, Eberhart and Steichen became partners as of August 1, 1962. As of the date of the filing of the original Complaint herein the residence of the partners was the same as it is now except that York and Eberhart were then residents of Washington. In or about October, 1963, Eberhart had been transferred by Smith to California and resided there until he withdrew as a partner on June 1, 1965.

10. Ray L. Treiger is now an employee of and Assistant Vice-President of Winmar Realty Development Company, having been elected to that position on October 17, 1960. He is now and has been at all times since September 30, 1960, a resident of the State of New York. He commenced work for Smith in 1951 in Seattle, Washington. In 1954, he went to New York as an analyst and assistant to Larry Smith. In August, 1957, he was transferred to the Washington, D.C., office of Smith. In that year he was made Assistant Manager of the Eastern Division of Smith with offices in Washington, D.C., and held that position, which involved direct client contact and the use of discretion in an executive position, until September 30, 1960, when he became Assistant to the New York Area Manager of Winmar Realty Development Company, Inc., in New York City. He was served in New York State with a copy of the original Complaint in January, 1963, and with a copy of the First Amended Complaint in New York State on July 31, 1964. Mr. Treiger worked on studies of the Severance Shopping Center Development until September, 1960, as aforesaid. Treiger's first connection with the work done on the Severance Center was in about May of 1955. He was in charge of work for plaintiff Hilltop on the Nutwood property Shopping Center Analysis. . . .

\* \* \*

14. The Austin Company, hereinafter called "Austin," is now and was at all times material hereto a corporation organized and existing under the laws of Ohio, with its principal place of business in Cleveland, Ohio. It has offices in Cleveland, Detroit, Houston, Los Angeles, Seattle and elsewhere in the United States and has affiliates in several foreign countries.

15. Wilbert J. O'Neill is and was at all times material hereto an attorney at law practicing in Cleveland, Ohio. He acted as legal and business advisor since the early 1930s to Mrs. Ashcraft and Mrs. Powell, and advised them in connection with the sale of Nutwood Farms. . . .

16. About the year 1954, Severance Millikin was the owner of a residential estate known as Longwood in Cleveland Heights, Ohio, consisting of about 151 acres. . . . In 1954, he employed The Austin Company to try to have the property rezoned. On December 20, 1954, the City of Cleveland Heights enacted Ordinance No. 73-1953, whereby the Severance site was zoned for development as a shopping center, commercial and professional office park and multiple family project. A taxpayer's action against the City of Cleveland Heights resulted from the enactment of Ordinance No. 73-1953. The rezoning was finally upheld on June 28, 1957, by the Court of Appeals for Cuyahoga County, Ohio, in its decision of *Sam D. Magid v. City of Cleveland Heights, et al.*, 143 N.E.2d 718. The taxpayer's subsequent appeal to the Supreme Court of Ohio was dismissed on December 18, 1957, in *Magid v. City of Cleveland Heights, et al.*, 146 N.E.2d 597. On April 7, 1958, Ordinance No. 13-1958 was enacted by the City of Cleveland Heights. This ordinance amended Ordinance No. 73-1953 to permit supermarkets in the Severance Center. . . .

17. After the 1954 rezoning, Millikin indicated that he desired The Austin Company to carry out the development of the property. Millikin and Austin agreed to the formation of a new corporation, Longwood Properties, Incorporated, in which each would have an interest. Title to Longwood was transferred to this corporation, and thereafter to a successor corporation, Severance Estate, Incorporated.

\* \* \*

20. On September 3, 1954, Larry Smith wrote The Austin Company concerning services to be performed in connection with the development of Severance. This was apparently the initial contact between Smith and Austin.

\* \* \*

32. In May, 1955, Austin employed Smith as its consultant in connection with the development of the Severance site, at a monthly retainer of \$2,500.00. Pursuant to this responsibility, Smith prepared a number of brochures containing economic analyses which expressed its opinion that the Severance site was well adapted to the development of a large regional shopping center. Also, pursuant to this employment Smith prepared materials for presentation to prospective tenants of Severance Center. After the monthly retainer was reduced to \$500 in May, 1956, Smith prepared other brochures on the subject of Severance. After the monthly retainer terminated in July, 1959, Smith produced further brochures. After February, 1960, it produced further brochures. . . .

\* \* \*

42. In July, 1955, Austin paid to Millikin and to Longwood Properties, Incorporated, a total of \$750,000 for stock representing the three-quarter ownership of Longwood Properties, Incorporated, a company whose chief asset was the 150-acre Severance property, which

includes both the Severance Center and the adjacent land owned by C.H.A. Corporation. . . .

\* \* \*

62. On November 2, 1955, *The Cleveland Press* announced:

"Ninety acres of park and office building surrounding a 60-acre island of quality stores are included in a unique preliminary plan for the Severance Millikin estate, Longwood, in Cleveland Heights, it was revealed today.

"...

"The land-use plan was developed after 10 months of study. The proposal will be referred to Cleveland Heights councilmen as a committee of the whole at next Monday's meeting."

\* \* \*

65. On or about November 29, 1955, Eden and Associates, public relations counsel for Severance, prepared a news release which stated in part:

"The character and scope of office buildings, campus-type research laboratories and commercial establishments being planned for the 151-acre wooded Severance Millikin Estate at Mayfield and Taylor Roads, were disclosed today as executives of Longwood Properties Incorporated prepared to discuss their preliminary land-use plans with members of the Cleveland Heights City Council.

"...

"In submitting the preliminary land-use map in compliance with the city ordinance adopted last December, which released the land for other than residential development, Beatty disclosed that the Austin organization, . . . has been working for many months with several of the country's leading authorities on traffic, economics, consumer attitudes and merchandising. These consultants have included:

"Larry Smith & Co. of New York, Washington, D.C. and Seattle, real estate economists. Consultants to Hudson's, Macy's, Eaton's of Canada and for important commercial developments coast-to-coast."

\* \* \*

147. On May 29, 1958, the Directors of Austin adopted the following resolution:

"RESOLVED, That considering our lack of specialized personnel for leasing and continued promotion and management of a Shopping Center Development at Longwood, as well as the possible investment required and estimated profit results, it is not considered a desirable project for The Austin Company, and Severance A. Millikin shall be so notified in accordance with Agreement of April 13, 1955."

Accordingly, Austin decided to sell and asked Smith to help in obtaining a buyer for Austin's interest.

\* \* \*

152. In the summer of 1958 Smith prepared materials for Austin to present to prospective purchasers of the property and talked to several investors on behalf of Austin.

\* \* \*

156. On July 25, 1958, Mr. O'Neill, on behalf of the Winslow sisters, wrote a letter to Hilltop Realty outlining a proposal as follows:

"Referring to your letter of May 24, 1958, and our several previous discussions, and subject to the approval of my clients, herein provided for, I am outlining herein the terms and conditions on which I think they would be willing to arrange for your proposed attempt to find a purchaser for the development of the south part of the so-called Nutwood property as a regional retail center, similar to the Northland Center or Eastland Center in Detroit.



"The owners would not be willing to grant to you any authority to bind them by any contracts for sale or development of the property or to fix the price or terms of sale or lease, and would be unwilling to be committed to any piece-meal sale of parts of the property, being interested only in an overall development and sale.

"There would of course have to be excluded from the property subject to the proposed arrangement any property sold to the State of Ohio, or other authority, for freeway purposes or appropriated therefore and any compensation allowed for damage to the residue involved in any such freeway development. The terms of compensation outlined in your letter of May 24, 1958 seem to be fair and reasonable but no option or interest in the property itself is to be acquired by your company and the owners will have to determine whether any proposed sale is acceptable. In other words, we would wish to have it clear that you did not have authority, for example to commit the owners to a sale at \$350,000.00 (on which your compensation would be \$10,000.00) leaving the purchaser at such sale to realize any value in excess of \$350,000.00 even though such higher price appeared at the time to be reasonable for the property. If such sale were available to the owners with a ready, able and willing buyer, you would, of course, be entitled to the prescribed compensation on the price offered and the owners would be entitled to the data you had accumulated and would be free to terminate the agency, unless they wished to renew your authorization on new terms.

"In summary, the owners are not willing to turn over to you the control of the sale or development of the property or any proprietary interest in the property, but I am proposing that they give to you an exclusive authorization for a period of six (6) months from the date their written approval of this proposal to undertake at your own expense to find a buyer for the property for a regional retail center, you to devote your efforts and funds to

the undertakings as outlined in paragraph (1) of the terms and conditions in your letter of May 24, 1958 to me, subject to the condition that no application for zoning changes may be made without the express approval of the owners and you are to be entitled to compensation as outlined in paragraph (3) of the terms and conditions of your letter of May 24, 1958. Said paragraphs (1) and (3) read as follows:

“(1) Hilltop Realty, Inc., together with any assistance offered it by the owners or their representatives, will expend its time, energy and finances, through its officers, employees and such hired experts as may be necessary, (a) to further explore the potential use of the property, (b) to seek interested persons, firms or corporations who will develop and improve the premises or finance same, whereby commercial or industrial buildings may be erected and occupants obtained, and (c) to seek such zoning changes as may be required and thus accrue to the owners the best return on their interests.

“(3) Should Hilltop Realty, Inc. be successful in its efforts to develop and improve the property and/or procure a purchaser or lessee, it is our proposal that we share in the resulting increased valuation according to the following schedule:

<i>Selling Price</i> (Land exclusive of freeway)	<i>Hilltop's Share</i>
\$250,000 or less	None
\$250,000 to \$350,000	10% of excess over \$250,000
\$350,000 to \$450,000	\$10,000 plus 15% of excess over \$350,000
Over \$450,000	\$25,000 plus 25% of excess over \$450,000

*Ground Lease*—5% of the value of the net annual rental capitalized at 5%

*Building Lease*—The then current rate of commission as recommended by the Cleveland Real Estate Board.’”

“You mention that the Nutwood property consists of approximately 170 acres. I think this is

about right but that acreage includes all of the Nutwood Farm not sold to the College of Telshe. A very substantial part of that 170 acres is likely to be involved in purchase or appropriation for the so-called Euclid spur or freeway development and some area not to be taken for the freeway development would lie north and east of the proposed Euclid spur. I think that the area south of the proposed Euclid spur would be approximately 130 acres of which about 99 acres are in Willoughby Hills and the balance in Wickliffe.

"You should have in mind that we have not been willing to consider a price of less than \$2500 per acre for the whole area south of the proposed Euclid spur.

"In working out any program, you would be authorized to consult with me as the representative of the owners, unless and until they made other arrangements. This should avoid the delay of communication with them except in any situation in which it appeared to me to be necessary to get special authorization from them.

"I understand that you have reason to believe that either Sears, Roebuck & Company or the Wm. Taylor Son & Company might be interested in a proposed development, such as you have in mind, and, assuming the approval by the owners of the program outlined in this letter, I think you would be reasonably safe in sounding them out in a preliminary way pending receipt of formal approval from the owners, provision for which you will note I have appended to copies of this letter.

"Except as modified herein, the terms of your proposal of May 24, 1958, to me are adopted. If the foregoing is agreeable to you, will you kindly note your approval on both accompanying copies of this letter and return them to me."

The proposal was approved and agreed to by Hilltop Realty and by the Winslow sisters, additional plaintiffs herein, on July 29, 1958.

\* \* \*

171. On December 15, 1958, Treiger wrote Frank Orrico [a Smith partner]:

\* \* \*

"The Austin Company would also be willing to sell the entire project, including the fringe area identified on the map opposite page 3.

"At one time you spoke about the possibility of being interested in it. Larry has too. I have not discussed this for a long time with Larry. I am sending this material to you for your review, and perhaps you might want to talk about it on your next trip east."

\* \* \*

177. Commencing in January 1959, Smith carried on discussions with Lambert & Company, now a Connecticut investment firm, which then had its offices at 2 Wall Street, New York, New York, concerning the possibility of participating in the purchase of or assisting in financing Smith's purchase of Severance.

\* \* \*

179. On February 10, 1959, Austin paid to Severance A. Millikin \$750,000 for stock in Longwood Properties, Inc., representing the final one-quarter ownership of the company whose chief asset was the 150-acre Severance property.

\* \* \*

182. On Sunday, February 22, 1959, the Cleveland Plain Dealer carried a news story which read in part as follows:

"The Higbee Co. yesterday announced plans for its first branch store.

"It will be located on the 151-acre Severance estate on the southeast corner of Mayfield and Taylor Roads, Cleveland Heights.

“Higbee’s will be the second major department store with a branch at this location. The Halle Bros. Co. has been planning a branch there since 1957.

“John P. Murphy, Higbee president, made the announcement. He said he hoped this store would be ready for business by the fall of 1960.

“‘Our company has been giving thought to the establishment of a branch store in Cleveland for some time,’ Murphy said, ‘and we have come to the conclusion that the outstanding location and opportunity for us would be to join with the Halle Bros. Co. and other stores in establishing a suburban store on the Severance estate.’

“Toward this end, Higbee’s is negotiating a contract with the Austin Co., builders.

“L. Paul Gilmore, vice president-treasurer of the Austin Co., said the decisions of Halle’s and Higbee’s had paved the way for full planning and leasing of the area. . . .

“Walter M. Halle, president of Halle’s, welcomed the Higbee branch, saying the shopping center could duplicate downtown shopping facilities.”

183. On Monday, February 23, 1959, Crume of Hilltop wrote Charles S. Knight, site planning consultant retained by Hilltop for Nutwood:

“This will confirm our authorization for you to contact Mr. Frank Thomas, Wickliffe City Engineer concerning available utilities for the development of the Nutwood property.

“Attached is the material from our files that Mr. Petti thought might be of interest to you. In view of developments over the week-end, it is probable that we might have to give more consideration to the multiple use of this property with less area of retail development.

“We hope to be able to arrange a meeting with Mr. Wilbert O’Neill, attorney for the owners of



Nutwood, on Tuesday afternoon or Wednesday of next week. We will let you know later of the definite time, and if it will be convenient for you we would like very much to have you present."

184. On February 24, 1959, Treiger prepared a memorandum stating:

"Paul Gillmore called to tell me that the announcement had been made in the newspaper on Sunday that both stores were going into Longwood so that the deal is "official" (although leases have not been signed with either store).

"Paul said that they were working their heads off developing the new architectural concepts, but in the meantime, the Austin Company is prodding him to get busy on undertaking the negotiations for the sale of the property. He therefore said that he would appreciate an expression of our attitude and opinion as to whether we were going to be interested in negotiating for it, within the next couple of weeks so that we could get started on conducting a negotiation with somebody else if we were not going to be interested ourselves and he felt that it was important to advise his board of directors accordingly very shortly."

\* \* \*

192. On April 30, 1959, Treiger wrote a memorandum to Larry Smith stating that Beatty of Austin had asked him to emphasize Gilmore's request that Smith be in a position to advise them on Smith's intent as soon as possible—"purchase or work for a sale in their interests."

\* \* \*

203. In June 1959, Mr. O'Neill wrote a memorandum of a conversation with Mr. John P. Murphy, Higbee's president, as follows:

"Talked today with Mr. Murphy of the Higbee Company. He told me that they were set to go to the Severance Millikin location and that their store

was to be the primary store and Halle's the secondary store—this being at the insistence not only of the Higbee Company but of the people who are promoting the development.

“While Mr. Murphy avoided comment on Halle management, he did not challenge my statement that Halle's was spread too thin with the sample order store at Shaker Square, another one at Cedar-Warrensville Center and now one proposed on the Millikin property. He also recognized that an awful lot of market in the Mayfield-Taylor Road location is being supplied by stores at other corners all along Mayfield Road from the Chagrin River in.

“He also indicated some doubt as to whether the Taylor Road location was far enough out from Cleveland or Shaker Square and agreed that our location 16 miles from the Square is a good one. He indicated that great reliance was placed on the Larry Smith report and that the report by another survey organization (Meyer(?)) did not favor the Millikin location so much but that both recognized that the bulk of the plush trade on which such stores rely was from the Kirtland Hills, Pepper Pike, Chagrin Falls residential areas. I did not argue with him that no store could live on the plush trade in these days when the buying power is from widely distributed areas and that other stores along Mayfield and elsewhere in the vicinity of Taylor and Mayfield are already taking up a lot of this trade.

“I told Petti today that if he is planning to make a market survey he ought to have Knight check with Smith and Meyers, particularly the latter, because their report undoubtedly makes an argument favorable to our location as against the Millikin location.

“Petti indicated that he also had learned that the promoters of the Millikin location required that the Higbee and not Halle's be the first store and that Strawbridge had so stated. I suggested that Sterling-Lindner-Davis might fit in better with

Higbee at the Millikin location but Murphy said that had been considered and rejected, as it was thought that area required two of the highest grade stores. Murphy told me that it was the Austin Company which insisted on Higbee, not Halle's being the first store.

"Murphy stressed the fact that the Smith report indicated that the area immediately surrounding the Millikin location was densely built up high-grade residential area from which they might expect great support.

\* \* \*

205. On July 2, 1959, a further agreement was entered into between plaintiffs Mrs. Ashcraft and Mrs. Powell and Hilltop, which provided in part as follows:

"B. In addition to its efforts to promote, develop and find a buyer for Nutwood Farms, Hilltop Realty, Inc. will seek to accomplish, at its own expense, certain specific objectives as follows.

1. *Ramps* east of Bishop Road connecting with the Euclid Spur at Bishop Road and leading to and from the east. One of the following:
  - a. Commitments from the State Highway Department for the construction of the ramps.
  - b. Appropriation by the State of Ohio or other political subdivision of specific land sufficient to accommodate the future construction of the ramps.
  - c. Private control of specific land sufficient to accommodate the future construction of the ramps.
2. *A market analysis* of the Nutwood Trading Area by a nationally recognized market analyst.
3. *A detailed engineering study* covering water, sanitary sewer, and storm drainage relative to the Nutwood development and including consultation with such of the following as

may be necessary: City of Cleveland Water Department, City of Euclid, City of Wickliffe, Village of Willoughby Hills, Lake County, Cuyahoga County and Ohio State Highway Department.

4. *Commitments* from the City of Wickliffe and the Village of Willoughby Hills to lend their cooperative efforts in any way which may be required for, or which may facilitate, the development of the Nutwood property.
5. *Letter(s) of interest* from a major tenant for the proposed retail development, or a major occupant of the property, or three secondary tenants (such as variety store, supermarket or junior department store) for a retail development.

“C. If prior to December 31, 1959 two of the objectives outlined in paragraph B above shall have been accomplished, then, this agreement shall be extended until December 31, 1960.

“D. *Price*: \$3500.00 per acre (\$595,000.00) or any price or exchange to which the seller may consent. It is recognized that as work proceeds a modification in the list price may be justified and advisable.”

Under this agreement the commission was stipulated to be:

“Fifty percent (50%) of the gross sales price in excess of \$500,000.00.”

206. In July, 1959 Smith re-evaluated the shopping center potential of the Severance property. This analysis substantiated the conclusions of earlier studies made by Smith. Field work for this re-analysis was done in July, 1959. . . .

\* \* \*

218. As of July 31, 1959, the retainer relationship between Smith and Austin was terminated. Austin and

Smith were then engaged in active negotiations for the sale of Severance to Smith. Austin advised Smith that if Smith did not become the purchaser of Severance it would be compensated for its services after July 31, 1959. Austin made its final payment to Smith in July 1959.

\* \* \*

221. Mr. Petti wrote to Mr. O'Neill on August 3, 1959, that he understood that The Higbee Company "has already or is very close to signing a lease at Longwood [Severance]. Hilltop read in the press during the summer of 1959 that the Halle Bros. Company and The Higbee Company were committed to go into Severance Center.

\* \* \*

229. On September 14, 1959, Hilltop wrote Larry Smith & Co. and two other market analysts asking for quotations on market studies of Nutwood for regional retail and commercial purposes. These letters read as follows:

"We are the representatives of the owners of a 130 acre parcel of relatively level, vacant land lying contiguous to the proposed Euclid Spur which connects Ohio State Route #1 with the Lakeland Freeway. Both of these highways are part of the new Freeway program of Greater Cleveland. The site adjoins the Cuyahoga-Lake County line in the heart of North-eastern Greater Cleveland and is about 15 miles from down-town Cleveland.

"It is our belief that this location has an excellent potential for the development for a regional retail and commercial complex. We would be interested in your recommendations as to the type of market analysis which would best serve our purpose and would be pleased to receive a quotation on your fee for such a study."

230. Minutes of Austin's Board of Directors of a meeting on September 23, 1959, read in part:



"He (Gilmore) stated that continued efforts have been made since December and it now appeared that Larry Smith, acting on behalf of himself and other investors was prepared to enter into an agreement with Austin for acquisition of Severance Estate Incorporated."

231. On September 24, 1959, Ray Treiger wrote an inter-office memorandum to defendant Ake Orndahl, who was then manager of Smith's New York office, concerning Treiger's receipt of Hilltop's letter of September 14, 1959 and reporting his subsequent telephone call to Petti of Hilltop:

"I've had a long talk with Mr. Petti. The property is in what we consider the secondary area of Longwood's trade area. (You'll note in the letter that the property is one the boundary of Lake and Cuyahoga Counties.)

"I do not think that we will find potential for regional center development at this property, in spite of what appears to be regional access—or at least future regional access after the freeways are completed. I also think that whatever center is developed there would have very little impact toward the west because of the May Company development and because of Longwood. On the other hand, the May Company branch stores license plate distribution indicated little penetration out this far (I don't know whether that's because of insufficient drawing power or insufficient population existing there).

"I told Petti that we are working on the Longwood property and felt that there might be some conflict in our own position. He said that he did not think that there would be because he did not think that his property would pull very far from the west. He said that he might pull 20 miles from the east, but if it went two miles to the west, he'd be lucky.

"The guy seems very intelligent and accepted the fact that the property may not be any good at all for a shopping center and possibly was better for industrial. There is a very heavy industrial concentration in this general area, I understand although I'm not sure about this. He is not aware, of course, of our possible ownership position there, but accepted our reputation and the fact that he could expect an objective study from us, almost regardless of the fact that we were working for the Severance estate.

"I am not sure I know how to handle this, in view of our possible investment position, and since this is your realm, I'd like to get your opinion on it."

232. On September 30, 1959, Treiger wrote Hilltop a letter proposal to make a "Shopping Center Analysis" of Nutwood for \$4,500. In this letter, Treiger stated:

"Our study will involve an analysis of the following factors:

- "a. A delineation of the trade area which would be served by the shopping center at the subject site and a determination of its various zones of influence.
- "b. Population of the trade area with an indication as to growth possibilities.
- "c. Consideration of the traffic situation existing by reason of the proposed uses, transportation situation, including possibilities of pedestrian traffic, public transportation and the arterial pattern which will serve the site and the trade area residents.
- "d. Income and purchasing power of the trade area population and the determination of the relationship of that purchasing power to the proposed development.
- "e. An estimate of existing sales potential and probable future competition, considering pres-

ent retail facilities and the future community needs for such facilities.

- "f. An estimate of sales potential available to the new retail facilities within the trade area."

Treiger also stated:

"Our report is basically *an owner's* report, to guide the owner in his planning of the development of his property.

\* \* \*

"Our fee for undertaking the site analysis under the alternative discussed above would amount to \$4,500 and would require 90 days for completion. It is possible that the time period might be shortened and we would attempt to complete our work within a shorter period."

233. On September 30, 1959, Treiger wrote a memorandum as follows:

"After speaking to Ake [Orndahl] on the 29th, I agreed that we ought to try and handle this inquiry. I spoke to Mr. Petti and told him that as long as he recognized the fact that we have been acting on the Severance Estate for some three years, we believed that we could act for him. He said that that would be fine and that he was pleased that we had taken the four days to think about the ethical conflicts of interest problem (I first talked to him and related the fact that we were working on the Severance Estate, Monday, the 28th) and he was satisfied with our position and asked that we submit a specific proposal. This is being done in a separate letter under today's date."

At the time of the taking of his deposition, Orndahl did not remember participating in any such conversation.

234. On October 5, 1959, Treiger wrote a memorandum, re: Hilltop Realty, as follows:

"I called Mr. Petti to find out the status of our proposal letter, toward the end of the previous

week. He asked if it would be possible for me to come out there for a personal meeting before going any further with the transaction. We therefore agreed that I would be out there for a meeting in Cleveland on the 8th of October."

235. On October 8, 1959, Treiger went to Cleveland for a conference with Hilltop. He prepared a memorandum concerning this conference as follows:

"I spent three or four hours with Mr. Petti, an associate of his, and a Mr. O'Neil, who is an attorney representing the family who owns the property. Petti's real estate company is a relatively small one, primarily involved in residential property, I understand, but their office is in a very small shopping center which includes two or three stores, on Mayfield Boulevard about four miles due east of the Longwood property. The property that they are considering, called "Nutwood Farm," is on the county line, in a pretty strategic location, I would say, after the development of the highway program which is now contemplated. We spent two or three hours driving around the property, the trade area, and discussing the report and the type of analysis that we would undertake. The area is experiencing rapid residential and industrial development.

"What we already know about the area, there's not too much new to add to this file memorandum, except to say that I think that the chances of us landing this job are probably 60-40."

\* \* \*

237. On October 9, 1959, Mr. O'Neill wrote a memorandum of the meeting of October 8 with Petti, Crume and Treiger as follows:

"I met yesterday with Messrs. Petti, Crume and Ray L. Treiger, who represents Larry Smith & Co., real estate consultants of Washington, D.C. The meeting had been arranged by Mr. Petti with Mr. Treiger to discuss a proposal by Larry Smith & Co. for a survey to determine the availability of

Nutwood as a site for a regional shopping center developments.

"Petti showed me proposals he had received from two other such consultants but the Smith proposal seemed most interesting, notwithstanding the fact that Smith & Co. had acted as consultants on whose advice at least partly the decision had been made by Higbee's and Halle's to go into the Longwood development at Mayfield and Taylor Roads. Treiger told us that his company had become advisers on this Longwood project for the Austin Company and Severance Millikin, after the Longwood area had been zoned for retail development but with an exclusion of any super-market. The area of course has since been re-zoned to permit a supermarket development, and after extensive litigation it was considered that it was legally possible now to go ahead with the Longwood development project. Treiger emphasized the possible conflict of interest between his firm's loyalty to Austin and Severance and any recommendations he might make to the promoters of the Nutwood project. I called Petti's attention to the fact that this loyalty to Austin and Severance might reasonably be expected to prevent Smith & Co. from making any recommendations or using other influence to induce Higbee, Halle or any other prospective tenant to go into a Nutwood development if that would interfere with their commitments to the Longwood project, but it was considered worth while to get Smith's survey and recommendations, having in mind that his work on the Longwood project had given him a great deal of background information, which would be useful on other phases of the project besides the matter of department store tenancies.

\* \* \*

"Mr. Petti told me that he had an appointment at Youngstown on Monday with the site engineer for the Bardolo organization to discuss the possibility of a Nutwood development. He indicated that Bardolo told him he would rather have his own



site engineers report on the possibilities than any of the location experts with whom we had had communications. Petti told me that he would not decide whether to employ Smith until after he had had his meeting with Bardolo representatives. He showed me a U.S. Shopping Center Directory which indicated that Bardolo had enormous activities in the Youngstown-Akron and other areas throughout Ohio and it appeared from the directory that Bardolo is the principal in all of these activities. Petti said that Bardolo indicated to him that he was negotiating sales of some of the developments which would provide him with ample funds to go ahead with the Nutwood development if it seemed advisable.

\* \* \*

240. On the same date, October 19, 1959, Treiger wrote a memorandum concerning Petti:

"Mr. Petti told me that his associates and the attorney, Mr. O'Neill, decided to go ahead with our survey. However, following that decision, 'one of the biggest national developers' (unidentified) approached the owners of the property with the idea of taking it over and developing it. On that basis, the owners did not want to go ahead with the expenditure for the market analysis which would only be of value to them if they themselves developed the property. This 'national developer' has been given until November 10th for a firm proposal. I told Mr. Petti that I felt that that made sense from their standpoint, and that we would be waiting, in the meantime, to hear from them if they decide to go ahead with our work. Consequently, there's nothing for us to do, except check this out on about the 15th of November, 1959."

\* \* \*

246. On November 16, 1959, Treiger wrote to Petti as follows:

"I have a note on my calendar to write to you about now to find out if the discussions were still

progressing between the owners of the farm and the prospective developer, who you told me about when we last chatted on the telephone."

\* \* \*

250. On November 20, 1959, Larry Smith wrote Frank Orrico a memorandum in [partial] text as follows:

"I assume that your files on this should be reasonably complete, but I am asking the girls to check up today with Doris by phone to find out whether copies of the significant letters and memoranda are available. The situation, as I understand it historically and at the minute, is covered in this letter. I think that we have to keep the whole story in mind in our relations with Austin's, or we may find ourselves in difficulty as far as further negotiations are concerned.

1. The negotiations for this property have been running along since January or February in fairly active terms. The price question was pretty well established in March or April, at which time we had the original serious discussions with Lambert. The price range between \$3,750,000 and \$4,250,000 was established in conversation with Paul Gilmore before he went to Europe on the 1st of June, and was finally confirmed at the \$4 million figure with their withdrawing the 10 acres for their own use about the end of July. I don't have the file in front of me, so the question of dates may be out a few days. However, the sequence of events is quite clear.
2. So far as I know, we did not have any draft of the lease for examination from our purchase standpoint until about April or May. I believe that Ray had a copy of the lease in its original draft form some three or four months earlier. At that time I was looking at it primarily from the standpoint of The Austin Company, who had some pretty definite ideas about some things, particularly utilities and other matters of that kind.

3. In May when it became apparent that we were going to have a serious interest in the negotiation for the property, Paul Gilmore suggested that we should undertake three things:

- a. The conclusion of the lease negotiations with the department stores;
- b. An examination of the economics of the utility system, the basis of negotiation with the other tenants;
- c. The contact with any prospective tenants, such as the medical and dental people.

“His argument was that these matters would be of greater significance to us than they would be to The Austin Company and that we should probably, for our own protection, handle these matters.

“He offered to make a deal with us that in the event of our *not* acquiring the property, the Austin Company would pay us whatever fee we required to cover our costs and pay us a profit for anything that might be done in these respects. In other words, he was not trying to get something done for nothing, but was essentially trying to protect us. His point of view was that we were not (to use his own words) being ‘diligent’ in protecting our own interests when we were completely familiar with these matters by leaving the responsibility for negotiations in their hands since the price was already settled and we could only be injured by their inability to handle these matters efficiently.

“I have no intention of referring to the responsibility for our failing to do this *except* to point out that it will come with *extremely* bad grace from us now to raise any question of either timing or anything with reference to the plan or the form of lease or the treatment of utilities when we had the opportunity of doing so six months ago. I am sure also that The Austin Company are frustrated as far as time is concerned in getting these leases signed. The responsibility in that particular respect might be very largely their own, but, if so, we are not in a

position to criticize because they asked us to do it and offered to pay us if the benefits did not run to us in our own purchase. Consequently, if anything that we suggest now results in further delay on the contract signature, including both the leases and our own contract. The Austin Company will take a very dim view of it.

"I feel that this is so much the case that they might even propose our offering the property to someone else at even the same or a lower price than we might be prepared to pay ourselves if we attempt to either re-trade the price on to be unreasonable in setting up a time schedule on the basis of the difficulty in getting department store leases signed.

"I have had to face this situation ever since last May or June, and I think that the relationship is such that we will not have any question initiated by The Austin Company. They have simply accepted the situation and are trying to work toward a conclusion. If, however, we broach the subject in such a way that it indicated that we felt that they had any share of the responsibility for the present difficulty, I am sure that they would resent it seriously and that is what I am trying to avoid.

---

"I agree with you that we ought to sit down and try to set up our program on this right away. There are obviously at least four points involved:

1. The negotiation with Austin's;
2. The negotiation of any major leases, such as the department stores, or any other transactions, such as the medical and dental building, which for any reason must be handled in the meantime.
3. The management activity such as would ordinarily be carried on by any prospective buyer, including architectural concepts, utility studies, rent schedules, merchandise plans, renting brochures, renting procedure, etc.

## 4. Financing negotiation.

\* \* \*

253. On December 5, 1959, Petti wrote a letter to Treiger, with a copy to O'Neill, as follows:

"Enclosed is your letter of September 30, 1959 outlining a proposal for an economic analysis relating to the land use of property known as Nutwood Farm located in Lake County, Ohio. Our authority to proceed with the study as set forth in the letter is affixed with the understanding that payment of your fee shall be made in accordance with terms agreed upon in our telephone conversation of December 4, 1959; that is, \$1500.00 upon delivery of the completed report and \$1000.00 every thirty (30) days until the balance is paid in full."

254. On December 7, 1959, Treiger wrote Petti, as follows:

"This is to acknowledge your letter of December 5th and to indicate our agreement with the proposed terms suggested in your letter.

"I have already, as a matter of fact, outlined our field work instructions, and the field work will be undertaken within the next ten days to two weeks, just as soon as it can be scheduled.

"We will be in touch with you as the work goes ahead, and we look forward to working with you on this project."

\* \* \*

256. On December 11, 1959, Head, Production Manager of Smith's Washington, D.C. office, wrote Petti, as follows:

"This is simply a note to inform you that our field man, Tom Darmstadter, will be in your area on Monday, December 14, and will contact you sometime during the morning hours."



257. On the same date, December 11, 1959, John Marshall, a report writer and economic analyst in Smith's Washington, D.C. office, wrote an interoffice memorandum entitled "Field Instructions - Hilltop Realty (Nutwood Farms)" to Tom Darmstadter, as follows:

"As we discussed, this a three-stage prune farm study. As a result of John T's work on Longwood, we are in excellent shape from the standpoint of most competition and population information. However, we will require all competition to be checked within a three-mile radius of the site, which is located at the northwest corner of Chardon and Bishop Roads in Lyndhurst.

"I have delineated this primary zone to be roughly bounded as follows:

North: Lake Erie and Euclid Avenue (east from Rush Road)

East: Chagrin River Road

South: Wilson Mills Road

West: Nottingham Road

"Secondary zone should check GAF comp. approx. 20 miles NE, E, SE.

"Since we have no information on either the Sears unit at Shoregate Center near Lake Shore Blvd. and East 305th Street, or the unit at 105th Street and Cedar Road, please obtain these areas. (The latter will be more applicable to Longwood.)

"You should be especially careful in checking the following locations as numbered on JT's competition map to see if any additions or corrections have occurred: #20, 21, 22, 23, 24, 25, 26, and 35.

"Please be alert for any new freestanding competition including discounters (e.g. Atlantic Mills, etc.)

"Any new planned shopping developments including Golden Gate Plaza, and Mayland Shopping Center (these two are located on Mayfield Road

west of S.O.M. Center Road) should, of course, be investigated.

“Mr. Petti will be notified in advance of your Sunday night arrival, so please contact him as soon as feasible on Monday.

“A visit to the Lake County seat at Painesville and the Geauga County seat at Chardon might provide other information of value to us. Contacting local newspapers or utilities in the two eastern counties could prove fruitful from a research standpoint. Any county maps would, of course, be helpful.

“Estimated completion dates of freeway improvements should be obtainable from the Metropolitan Planning Commission by phone.

“Good luck.”

\* \* \*

259. On December 22, 1959, Darnstadter wrote a memorandum to John Marshall entitled “Field Notes”: as follows:

*“Site*

“The proposed site is located on the northwest corner of Bishop Road (Rte. 84) and Chardon Road (Rte. 6). Part of the property borders the Lake County and Cuyahoga County line. The property originally contained 170 acres, however, 40 have been sold to the State Highway Department for the planned Expressway spur. The property is relatively clear with a few slopes. I wouldn’t anticipate any development problems except for some grading. Mr. Petti indicated to me that engineering tests have been made of the property and proved positive, in fact, he indicated that the soil conditions were excellent.

“The area directly around the site (1 block radius) presently has a few scattered houses. Directly across the highway on Route 6, at the county line, is a site where a 50-bed hospital will be constructed.

### *“Access*

“Access to the site may be considered excellent. The property will have frontage on four highways. Euclid Avenue (Rte. 20) is a major six-lane artery which runs east to west. Route 84 and Route 6 are two-lane arteries which may have to be widened if the proposed center is developed due to the additional traffic. The Expressway will touch the property as indicated on the preliminary site plans obtained from Mr. Petti. According to Mr. Spillberg of the Ohio State Highway Department, a cloverleaf is planned at Highway 84. The site plans only indicate two ramps (on the west side of Highway 84); however, recent pressure applied upon the Highway Department by the residents of Willoughby Hills has brought about a change to a four-ramp cloverleaf. Mr. Spillberg informed me that this revised cloverleaf has not been approved by the Federal Government; however, they are proceeding in their plans under the assumption that this addition will be made. He indicated to me also that if the necessary funds are raised he would estimate that the Expressway spur would be open to traffic by the end of 1962.

“The Industrial Belt, which is tremendous and contains some of the leading industries in the nation, lies in the lowlands between Euclid Avenue and Lakeland Boulevard. North to south access is difficult from Route 20, therefore, it is my opinion that the primary zone should be confined to Euclid Avenue for this Industrial Belt forms a definite barrier. Also there is a relatively low density residential area between these two arteries.

### *“Population and Income*

“Population data was obtained from the Lake and Geauga County Planning Commissions and seems to be fairly complete. The information from Lake County was based on school enrollment while the Geauga County population data is based upon the 1950 census and estimates by outside consultants who are connected with the Cleveland Plan-

ning Commission. I would be a little skeptical about using the population projections of Geauga County for they seem to be quite optimistic. Comparisons should be made with the population data obtained from the Cleveland Illuminating Company. At this point I would like to call your attention to the excellent land use map in the comprehensive plans that I obtained from the Lake County Planning Commission.

"As mentioned previously, population directly around the site is not particularly dense, however, it becomes extremely dense to the south (1 mile) particularly in the area around Lyndhurst. Homes in this area range from 24,000 to \$34,000 and some go as high as \$50,000. To the east, Wickliffe and Willoughby are older residential areas and it is my opinion that incomes would not be as high as compared to the southern portion of the trade area. There are some new homes being constructed in this area which sell for approximately \$20,000. The high income areas are below Mayfield Avenue and homes range anywhere from \$45,000 to \$100,000.

"The population is not as dense in this area since the homes are on three-quarter and one acre tracts of land.

#### *"Competition*

"I obtained *all* competition from 200th Street to Highway 306 (west-east) and from the Lake to Mayfield Avenue (north-south). GAF competition was obtained from other areas throughout the estimated trade area. Competition is not particularly significant in the primary zone. There are few convenience centers in this zone located along Euclid Avenue. Department stores are located in the Center Shore, Southgate, and Eastgate shopping centers. The business district of Painesville has two junior department stores and a Sears' unit which primarily carries hard lines. Despite the lack of off-street parking facilities, this business area was quite busy. This possibly may be attrib-

uted to the fact that Painesville is the Lake County seat.

"Locations indicated in the field notes were checked. The only additions were in the Southgate Shopping Center. I also visited the Golden Gate shopping plaza, an intermediate center, which has recently been developed. I visited this center on two occasions and each time there was very little traffic. This center has additional land for expansion, however, it is doubtful if a department store would locate here since the Eastgate shopping center is located approximately one-half mile east and is presently constructing a new Bailey unit. The Mayland shopping center is a very old center and has a number of vacant stores. It primarily contains convenience type facilities.

"I think I covered the high spots of my field trip in this memo. If there should be any questions, I would be glad to get together anytime that it is convenient to you and that I am in the office, we can get it thrashed out. If necessary, I will dictate another memo with the information on it so that you can have it in your hand whenever you feel that you need it."

260. On December 22, 1959, the Higbee Company entered into a 25-year lease with Severance Estate, Inc., for a branch store at Severance. On December 23, 1959, Halle Bros. Company entered into a 25-year lease with Severance Estate, Inc., for a branch store at Severance. The terms of these leases were agreed to a "considerable time" before the signing.

\* \* \*

263. The Cleveland newspapers carried extensive articles on December 29th, 30th and 31st, 1959, announcing that The Halle Bros. Company and The Higbee Company had signed leases for the occupation of branch stores at Severance Shopping Center. . . .

\* \* \*



264. On January 4, 1960, Treiger wrote a memorandum as follows:

"I spoke to Mr. Petti about the situation, specifically, the nature of our findings being negative with respect to both a regional and intermediate center, and suggested that we send him a memorandum explaining our conclusions and leaving it up to him whether he wanted us to finish the report or not. He said that that would be fine, although he was somewhat disappointed."

265. On January 8, 1960, Smith mailed to Hilltop a written memorandum entitled "Shopping Center Opportunities at Nutwood Farms."

266. On January 13, 1960, Harry Ratner offered, through Hilltop, to pay the owners \$3,500.00 an acre for Nutwood.

267. On January 18, 1960, Mr. Treiger came to Cleveland and met with Mr. Petti and Mr. O'Neill. He wrote a memorandum on the meeting, which read as follows:

"I spent the afternoon with Hank Petti and a group of his associates, in connection with the Nutwood Farm analysis in Lyndhurst. They accepted our conclusions with respect to a negative potential for regional intermediate or neighborhood shopping centers.

"They are now contemplating a plan development of the total program on a recreational semi-institutional basis. He had a very rough schematic for ground use laid out showing the motel near the interchange, a couple of restaurants, a bowling alley (Brunswick people have indicated to him their interest in a 40 alley setup), a nine hole golf course (he found that the investment of 10,000 per hole quite possibly could be paid in three to four years, so that in time you could afford to tear out the golf course and put in more intensive use), swimming club, with cabanas, ice skating rink, etc. We drove around for quite a while looking at other develop-

ments in other parts of the Cleveland Metropolitan area. I told them that I thought that the idea made a lot of sense, for the property, but that he had to be prepared for the fact that the patience that would be required could possibly be even more than that required for a shopping center, and that the whole thing hinged on promotional aspect and the luck of getting started with the right couple of major deals, and that these would be keyed to promotion, rather than analyzed potential such as would be the case with a department store or super-market.

“The meeting went very well, and I think that there may be some further work for us in connection with these other developments at another time.”

268. A memorandum entitled “Investment Activities” dated January 20, 1960, of the Winmar Office, Seattle, indicated that those present were Messrs. Orrico, Arpke and McConnachie, and that:

“The meeting was for the purpose of discussing various points raised by Larry in phone conversations with Mac the last two days, specifically to arrive at an agreement on our attitude on the Bay Shore transaction and what we should do in the next meeting with Gilmore on the Cleveland deal. The following is a summary of the points in Mac's conversations with Larry which he reviewed for the benefit of the partners.

“... ”

“3. Cleveland—Larry feels we are morally committed and that it would be injurious to our reputation if we either withdrew or failed to perform. He believes we can withdraw, but in that case he would have to change his approach. He believes personally that we should do the deal and that we can perform if we decide that we want to do so. In the Board meeting with Austin's last July we agreed to provide management when the deal

was resolved. We are already committed to that, and they think the deal is resolved.

"Larry understood from Ake [Orndahl] that Frank [Orrico] thinks we should revert the deal to Austin's for the next 90 days and take an option position....

\* \* \*

"Fred [Arpke] stated that he doesn't want to be in the deal whether we take it or not because

1. It apparently is an impossible schedule.
2. He thinks it involves a financing responsibility which no one would even try to accomplish.
3. He thinks Austin are being completely unreasonable on the architectural problem and he doesn't want to be obligated to put out that kind of money. The logical arrangement would be for them to contribute at least that much which would represent the major out-of-pocket cost to us.
4. We could provide the management if it was a good deal otherwise. He doesn't think we could handle the architectural costs involved.
5. The document is so tightly worded that he would be afraid of it and all the protection runs in Austin's favor."

269. A memorandum from the Smith file dated January 20, 1960, entitled "NOTES OF DISCUSSION RE: SEVERANCE CENTER, CLEVELAND" reads:

"This is a memorandum which represents the attitude expressed by Frank and Fred in a meeting with Mac and Hilde this morning concerning what the company should do in pursuing the situation in Cleveland.

"Against the background of a memorandum which Frank prepared concerning the four basic problems that appear to exist in Cleveland and the program for specific action over the next 90 days, it is felt that the specific program for action

should be adopted and followed through, but with particular emphasis on attempting to minimize the cash exposure for expenses during the next 90 days, but that the maximum effort should be exerted towards attempting to locate a financial partner. If at the end of 60 days it is apparent that no such partner is available, a statement should be made to the Austin Company for whatever reasons appear appropriate, and these reasons could be the four set out in Frank's memorandum, that to date we have not been able to find such a partner and that we will do one of two things. One would be to notify them that we intend to turn the property back to them due to the inability to finance or, second, to continue with our development effort, but at their expense, and continue on their behalf to attempt to find a developer.

"The assumption of having to step down because of lack of financing, or alternately to continue to operate at Austin's expense, assumes that it would be impossible to renegotiate the terms of the agreement which currently exist with Austin Company. It may be possible, with a modification of the time schedule and the architectural considerations, that there might be more justification for our proceeding at our own expense."

270. On January 20, 1960, Mr. Petti wrote Mr. O'Neill as follows:

"We have given considerable thought to alternative uses for Nutwood and the possibility of becoming participants in some sort of a land use plan.

"Since our meeting of Monday at the airport with Mr. Treiger of Larry Smith & Company, I have made several inquiries on the possibility of some land users joining with us in forming a syndicate. It seems that their interest in participation is advanced with reservations when faced with the necessity of making definite commitments.

"They express misgivings about the rezoning; the political complexities regarding utilities; as to

if and when the spur becomes a reality; how long will they have to hold the property; how much of it can actually be put to use now; who puts up the working capital.

"It must be recognized that their concerns are basic and real, although these problems could probably be resolved over an extended period. However, in view of the above, we believe that we actually have no definite alternative that we can talk about at this time.

"We recommend that the offer to purchase, as submitted by Harry Ratner, be given strong consideration.

"However, we do believe that the deal can be strengthened, and are submitting some changes for a counter offer which we feel we might be able to persuade the purchasers to accept.

*"Suggested Changes*

- (1) Ernest money increased from \$45,000. to \$75,000.
- (2) Additional down deposit increased from \$100,000. to \$120,000.
- (3) Time limit reduced from 18 months to 12 months.

"For the initial down deposit of \$195,000, as in 1 and 2 above, only land that is purchased by the state of Ohio shall be released.

- (4) Release amounts increased from \$4,500. to \$7,000. per acre, pertaining to Chardon Road frontage and inside land only.
- (5) Bishop Road frontage to a depth of 400 feet to be released on the basis of \$150.00 per front foot.
- (6) The balance of \$400,000. to be paid in annual installments of not less than \$100,000. each with 6% interest per annum.



“For each principal payment made, land shall be released as per items 4 and 5 above.

“We still are of the firm belief that time will increase the value of this property, but whether the time, effort, and capital expended, not to mention risk involved, is commensurate to the return, leaves us with the feeling that we are playing with a highly speculative venture, particularly as far as the present owners are concerned.

“It seems to us that the Ratners, whether we like to admit it or not, are probably one of the few who not only can resolve the political complexities, but also can work in greater harmony with the Telshe Yeshiva College people in dispelling damage claims regarding loss of road right-of-way from Euclid Avenue. This, as you no doubt know, could become a pretty thorny issue.

“Time and timing in a real estate deal are always important. At present, the Ratners’ interests in this transaction seems to be high. We therefore suggest that it is to our mutual advantage to move toward the consummation of this deal with the least possible delay.”

271. On January 20, 1960, Messrs. Orrico and Arpke met with Ian McConnachie in Seattle. Orrico and Arpke expressed reservations as to whether the Smith Company should proceed with the Smith-Austin agreement on the terms proposed by Austin. . . .

\* \* \*

273. On January 22, 1960 Mr. O’Neill wrote to Mrs. Ashcraft and Mrs. Powell. Part of the letter was as follows:

“You already have received the planning map made by Knight for Hilltop Realty Company. The Hilltop Realty Company has obtained from Frank A. Thomas & Associates, civil engineers, the report as to the availability of sewer and water services which was one of the things to be provided by Hill-

top as a part of the consideration for their authorization to represent you. They have also obtained from Larry Smith & Company of Washington, D.C. a preliminary report as to the suitability of the Nutwood site for a regional shopping center development.

"Smith's conclusion is that, because of competitive conditions, the site is not suitable for such development as a regional shopping center, or for an intermediate shopping center. The report is not complete but it indicates that a completion of the report would merely include a lot of statistical data in support of the negative conclusions reached in the tentative report.

"Mr. Treiger of the Larry Smith organization was here on Monday of this week and, with the Hilltop representatives, I rode around with them on a survey of other areas which might be thought to be comparable in some ways with Nutwood. One of the purposes of this survey was to consider whether, as an alternative to a regional or intermediate shopping center, the site might profitably be developed for a different type of use, namely

- (1) For a motel, restaurant and filling station to serve the traffic which in considerable part might be expected to be developed by the Euclid Spur exchanges at Euclid Avenue and Bishop Roads;
- (2) Approximately 20 acres for garden type apartments which might be expected to serve at least in large measure junior executives connected with the various industrial plants in the area;
- (3) A health and hobby type of institution for elderly people who were ambulatory and might wish to live in an area in which they could get physiotherapy treatments, play on a pitch and putt type of golf course and enjoy the outdoor surroundings;
- (4) A bowling alley development. At this point Mr. Petti said that the Brunswick Balke Col-

lander people think they could profitably operate 45 lanes.

(5) A skating rink and swimming pool area .

(6) An open air theatre.

“This scheme contemplated that about 60 acres of the land at the corner of Chardon Road and Bishop Road would be reserved for the development of a shopping center when there was a demand for it, with the idea that in the meantime this reserved area might be devoted on a temporary basis to some kind of entertainment. Treiger seemed to think that there was enough merit in the idea that it warranted further study and it was understood that the Hilltop people would outline a program which they would submit to Treiger for his consideration and later submit to us.

“You should know that after four years of legislating, litigating and talking the Higbee and Halle people have definitely announced their commitment to lease portions of the Severance Milliken Longwood property at Taylor Road for a major shopping center development. There are also under consideration now at least three other large shopping center developments—two by the Ratner and Viscosi interests at Cedar & Richmond Roads and at Shaker Blvd. & Green Road, and one by DeBartholomeo at Mentor, Ohio.

“It became evident in the course of our discussion that if the May Company had not gotten the jump on the Halle and Higbee Companies with its 325,000 sq. ft. development in the shopping center at Cedar and Warrensville Center Roads, the Higbee and Halle people might have gone further out than the Longwood site. But the opinion seems to be now that with so many competitive developments pending, no responsible developer could be gotten to go forward with a large shopping center development at Nutwood.

“In the face of all this, Mr. Petti has come up with a proposal from Albert Ratner to purchase

Nutwood for \$595,000. The terms proposed are entirely unsatisfactory but Petti seems to think that the Ratners would meet our terms. They proposed \$45,000. when the agreement was signed, another \$100,000. when the papers are put in escrow, either after the State of Ohio acquired the land for the Spur or at least within 18 months—the balance of \$450,000. in annual installments over a period of 6 years with interest at 6%—no interest to be paid until the expiration of 18 months or the settlement with the State of Ohio for the Euclid Spur, whichever came first. There was also a ‘sucker’ proposal for a release scheme which would enable them to impair the security. I think that the Ratners are induced to make the offer in order to take the property out of the market for sale to any other developers, with the idea that the ownership of it will help them to develop their large residential holdings in the area and also help in their trading on the proposed ventures at Cedar & Richmond and Shaker & Green Roads, not to mention others in which they may be interested. The Ratners are probably the largest property developers and owners in the whole area.

“Under their proposal the Ratners would take the property subject to the easements which the College of Telshe has, and with the benefit of whatever obligations the College of Telshe has to help work out a drainage and street improvement system to get out to Euclid Avenue. Of course all of these plans for easements and roads out to Euclid Avenue were made before the Euclid Spur project was developed. The Spur will eliminate all the easements and the Ratners would have to work out with the College of Telshe and the College, as well as the Ratners, would have to work out with the State of Ohio the question of what compensation and damages the State would pay for the land it takes for the Spur project. Of course the State will claim that the project doesn’t damage the rest of the property but benefits it.



“Petti seems to think that a plan for development might be worked out not involving immediately a shopping center and that a syndicate might be formed in which you would be willing to have a participation, which would take the property over subject to giving you, if not a prior claim for the price of the land, at least a large share of the partnership ownership of the site—the other partners to pay for their shares by putting up the capital needed to get the project to the point where sales or long time leases could be made to ultimate users. My own opinion is that it would be a hazardous thing for you to take a minority interest in any syndicate. There are too many chances for your partners to develop conflicting interests on which they would pyramid profits that would be charged against the costs of the partnership in which you would be sharing.

“I don’t think you want to go into the real estate development business and I doubt that anybody can watch all the inside deals that could be involved to see that you would not get trimmed on any such deal. I would much rather see you sell the property and employ the proceeds in a manner which you could control. I say this notwithstanding the fact that a sale at \$595,000. would involve you in a capital gains tax of \$110,000. to \$120,000. Your cost on the property is less than \$70,000. But even after this tax you would come out with a net profit of about \$350,000. plus the recovery of your \$70,000. cost basis. This looks pretty good as compared with the prices at which the Ratners and their various fronts tried to get us to sell the property. The highest offer was \$250,000. and the highest suggested was less than \$350,000. gross. The Ratners will probably want an answer pretty soon on their proposal but they must expect that you will take time to consider it as against alternative methods of dealing with the property. I am writing you now merely to bring you up to date and in the hope that you will indicate to me for my guidance in negotiations whether you want to consider at all taking



any kind of a partnership interest in a development scheme as against an outright sale of the property. I have already indicated that my judgment is against your going into a real estate speculation, even though the profits available might seem very large. There are too many hidden factors including the possibility that this spendthrift economy of ours may get an awful jolt in the next few years. My own feeling is that the time to sell is when the gamblers are buying.

"You will remember the complicated scheme which the Richard Hawley Cutting-Lehman interest submitted for developing the property which would leave you in the position of trying to find your equity in the midst of their very elusive program. You may expect a similar problem on any deal for a partnership or equity interest with a developer. Before anything is sold, or leased to anybody, the developer has to work out and pay for water, sewer and roadway schemes and he has to be sure that the way he allocates space to each participant in the development avoids damaging the rest of the property. This may not be easy if the development is done piecemeal.

"Since dictating the foregoing, I have received from Hilltop Realty a letter dated January 20, 1960, copies of which are enclosed for each of you. This letter seems pretty strongly to confirm the views previously expressed herein.

"I would reduce the initial down payment to slightly under 30% of the sale price and have the balance payable in installments over four years so as to spread your profits over the 5-year period. While this would not reduce your tax, it would enable to you to offset these profits against losses on other investments, if you should happen to have bad years.

"I think each of you should let me have your views at the earliest possible date."

277. On January 26, 1960, Larry Smith wrote Gilmore of Austin a letter which reads:

"Before proceeding any further with the negotiation for the Severance Estate, we would like to be certain that the basic concept on which we have been working is in accordance with your ideas. There have been certain developments in our conversations with you during the last 60 days which have raised a question in our mind, such as:

- (a) The fact that plans and specifications are not settled for the department stores.
- (b) Your suggestion that the architect should operate under your direction.
- (c) Your suggestion that there should be a penalty payment of \$250,000.

"When we started to discuss this situation in May or June, I pointed out that the price which you were discussing could only be contemplated by a developer who had ample opportunity to eliminate the various contingencies at his own expense.

"The fundamental contingencies were these:

- (a) The ability to finance in view of the high price of the land, the changing financing market and the inherent difficulties in shopping center financing.
- (b) The very real difficulties of operating on a cost-plus designated contractor basis, which to our knowledge has not been undertaken in shopping center construction.
- (c) The necessities of operating within your approval until completion of payment was assured.
- (d) The relatively tight timing schedule which we were proposing in order to avoid the unsatisfactory nature of a wide-open timing schedule from your standpoint.

- (e) The problems of the department store leases, especially the negotiation of plans and specifications which, in our opinion, are not yet satisfactorily solved in the light of present experience in shopping centers.

“We understood that your basic interest was in a maximum price for the land and the retention of the building contracts.

“We therefore agreed to use our best efforts to work a transaction out on that basis and we have great confidence in our ability to do so. We have been disappointed in the reaction of some of our ordinary financial associates to the cost-plus deal for construction and we have also had criticism of the short timing and the form of the department store leases. We do believe, however, in the value of the property and are prepared to undertake it, recognizing that our reputation is at risk, plus whatever investment we would make, which is already reaching substantial figures.

“However, the \$250,000 penalty in itself is extremely disturbing to us because it suggests an intent on your part to treat this as a firm contract rather than a good faith attempt, using our own resources and those of our associates to work out a very difficult development problem for the joint benefit of Austin and ourselves.

“Quite frankly, we do not know of any developer who would undertake this project on a contract basis on the terms suggested in our arrangement with you. The stipulations of the zoning; the conditions of the department store leases; the timing problem, having in mind the fact that the plans and specifications must still be worked out with the department store; the tremendous financing problems involved in the Austin building contract; the limitations imposed by meeting your approval as the job goes through, plus the condition that the architect should be responsible to you—all of those conditions are onerous and in our opinion would prevent any experienced developer undertaking the

job without substantial modification of the contract terms—however, on the assumption that the deal in effect is an option, kept alive by performance and investment, by intelligent and competent developers, the deal is practical and we believe capable of accomplishment.

“If, however, your present suggestions indicate that you regard this as a contract with penalties for nonperformance rather than a working option for development purposes, we would prefer to step out of the deal.”

278. On January 28, 1960, Petti wrote to Edward J. DeBartolo as follows:

“Needless to say, that I am disappointed in not having received any proposal from you relative to the purchase of Nutwood Farm, however, that is not the prime purpose of this letter.

“Sometime in late November, Clem Smeal authorized me to proceed with a sewer design study for the area in and around the Nutwood site. The results of this study plus a utilities plot map are now in my possession. Are you still interested in availing yourself of this information? The cost to you as per signature of W. C. Smeal, is two hundred dollars (\$200.00).

“I also have at this time a very interesting study analysis by Larry Smith and Company on the subject property and the trading area surrounding it. It recites the Highway Department’s plans for a four-ramp cloverleaf at the point where the Euclid spur crosses Bishop Road (Route 84), and the fact that the Highway Department estimates that the spur connecting the North-South Freeway with the Lakeland Expressway, will be open to traffic by the end of 1962. This pertinent information is only part of a very enlightening study, if you are interested, this too, can be made available to you.

“Ed, I am of the firm belief that all the data that we have on Nutwood, strongly suggests that the time is here for someone to act, in order to capitalize on an opportunity, while it is still available.”

\* \* \*

280. On February 10, 1960 Laurence P. Smith, Frederick C. Arpke and Frank A. Orrico, who were the sole co-partners doing business as Larry Smith & Company, executed an agreement whereby Austin agreed to sell all of the stock of Severance Estate, Inc., an Ohio corporation, to Smith on stated terms and conditions. Severance Estate, Inc. was the owner of the 150-acre site which later became the Severance Center and the adjacent land. The agreement was terminable by Smith in the event it considered itself unable to proceed. The agreement provided that the capital stock of Severance Estate, Inc. be transferred to Smith but that it be endorsed in blank and returned to be held by The Austin Company as security until it was determined whether Smith was able to arrange financing and other preliminaries necessary to development. The price was \$4,000,000, and Smith also agreed to deed twenty acres of the adjacent property back to Austin and to give Austin the exclusive right to be the engineer, architect and construction contractor for Severance Center and in the adjacent land. These terms which were finally settled were substantially the same as those agreed to between Smith and Austin by September 1, 1959.

\* \* \*

286. On February 16, 1960, Treiger wrote a memorandum in part as follows:

“With the Austin Company, we spoke of the desirability, at this point, of *announcing* at least to the Higbee and Halle Companies, *Larry Smith & Company's participation* in the ownership. At that point, it would be obvious to the stores that we had not rested during the past two months but had been extremely active both by way of the purchase agreement and the work that we authorized on our own with Gruen, for example. We tried to get ahold of Larry to clear this, but could not during the course of the day so we consequently let the matter pass.  
...

\* \* \*



288. On February 20, 1960, Larry Smith wrote Gilmore of Austin a letter which reads in part:

"I had intended to speak to you about the question of an announcement, although it had been my expectation that it might be postponed until a later date because we had discussed with you the concept of our representing that they were acting for the Severance Company still under the ownership of Austin's—and, as a matter of fact, it is expressed in that fashion in the documents.

"However, as you possibly know, the transaction is currently known 'in the streets.' This is a thing that always disturbs us because I do honestly believe that we are very strict in our maintenance of a matter that is expressed as being confidential even under circumstances where we think that there may be difficulty in keeping it so. However, it is difficult for us to deny sometimes when we are faced with a direct statement by somebody on the outside that they know that a certain condition exists—if, in fact, they know the statement to be correct.

"Coming from the general to the specific—Bruce Hayden of the Connecticut General Life Insurance Company of Hartford, Connecticut, spoke to me in Pittsburgh the afternoon of the Eisenhower dinner when I had just left you in Cleveland. I ran into him unexpectedly at the meeting I proposed attending, and he asked me, out of a clear sky, whether we intended to talk to them about financing of the Severance property. There were three or four other people in the group and the way that his questioning was framed indicated that he knew that some negotiations were afoot. I therefore said that that question would be up to the Austin Company and that if they wished us to put the material in the Connecticut General's hands when they were ready for financing we would do so. Bruce then said that his people had been in touch with it for five years and thought it was a very interesting piece of financing and made the statement that the Austin Company had told them they were disposing

of their interest to us and that he was interested in whether we would be looking for financing beyond just the mortgage financing. Under the circumstances, I could not say that this was a total untruth. Subsequently, when the others had left, I told Bruce that you had discussed this with us but that there was nothing complete and we didn't know right at the minute what might result. I asked him in general what their interest was in such things, and said that even for your account you might be interested in a financial partner, and he suggested that we discuss it with them whenever we were free to do so.

" . . .

" . . . I am not in favor of any newspaper publicity to a matter of this kind, but I do think that a statement to Halle's and Higbee's that we have entered into a development contract with you by which it is contemplated that a group in which we have a substantial interest will acquire the property when you are satisfied that your intentions in connection with this development have been fulfilled, would be the best thing to do. This would be all that would be required for the time being. Any further discussion of this transaction could take place at a later date. It represents the actual fact at the minute and I think is as far as we should go."

\* \* \*

290. On February 24, 1960, Mr. O'Neill wrote to Mrs. Powell [sic, Miss Winslow] as follows:

\* \* \*

"I cabled you yesterday morning (February 23rd) as follows:

'Mildred Winslow

Hermosilla 13,

Madrid, Spain

Delay dangerous. Telephone immediately.

O'Neill'

\* \* \*

"A week ago Wednesday, after I had been trying for two days to reach you, the Cleveland Press published a report that the Federal Bureau of Roads, which is expected to finance 90% of the freeway cost, including the Euclid spur, had issued an order that on federally financed roads there were to be no more traffic interchanges less than 2 miles apart. There are two traffic interchanges proposed to serve Nutwood—one at the Euclid Avenue end and one at Bishop Road. At the very beginning the State Highway people told us of the opposition of the federal government to a diamond traffic interchange at Bishop Road but, as the result of our efforts including a very effective plan of getting Wilmoughby Hills and Wickliffe, in their own interests, to take the initiative in seeking to persuade the federal and state authorities to install the 4-way interchange at Bishop Road, we had gotten a commitment from the State Highway Department to locate the interchange there and the enclosed clipping from the Cleveland Press shows this proposed interchange.

"The newspaper reports have indicated that while the new Bureau of Roads interchange rule is operative from January 1st of this year, it may not be enforced against interchanges already planned and where the property involved has been acquired and the contracts let before June 30th of this year. Four months is a short time in which to work out all the problems involved in acquiring the land for the Euclid spur, agreeing on compensation and damages and getting bids submitted and contracts let, and this whole operation will involve a great deal of hard and costly work.

"It seemed most urgent that we try to get a contract for the sale of the property with a substantial down payment completed before time runs against us on this new order. If the Bishop Road interchange were dropped, I would not be surprised to see a loss of \$175,000 to \$200,000 in the value of your property. There are all kinds of negotiations and manipulations involved in this situation of the

kind in which promoters like the Ratners are expert and some are of the kind in which neither you nor I would want to be engaged.

"I was astonished that your letter of February 19th indicated that you had not read my letter of January 22nd carefully and did not have it with you when you were writing to me. I have heard nothing from Petsey and I suppose your letter to her will give rise to further delay.

"I think that you and Petsey should each write me, telling me that I am authorized to negotiate a firm contract for the sale of the property on terms which I consider proper for your security. In view of what has happened, I must have this kind of an authorization to reassure Mr. Petti and to make any progress in negotiations with the Ratners or anybody else.

"Furthermore and especially in view of the risk of losing the Bishop Road exchange, I should have your long distance telephone numbers and cable addresses, and you should be available for any necessary signatures, including deeds, without any more delays than is involved in mail transport.

"Please let us have no more delay.

"Kindest regards."

\* \* \*

295. On March 4, 1960, Lambert & Company informed Smith that it was not interested in participating in the Severance project.

296. On March 7, 1960, Newman of Winmar, New York, wrote a memorandum which reads:

"Arrived in Cleveland mid-morning and went immediately to the hotel for a meeting and lunch with Paul Gilmore and Ham Beatty.

"We discussed, generally, how we would tell Higbee's and Halle's of our new role in the development of Severance.

"At 1:30 I went to a meeting at Higbees. This meeting was attended by Herb Strawbridge, Bob Wright, Paul Gilmore and Ham Beatty. At this meeting Paul Gilmore disclosed the fact that Larry Smith & Co. was taking over the development of Severance Center. Strawbridge and Wright seemed to have had an inkling of this, so the disclosure did not come as a complete surprise to them. Gilmore explained that the Austin Company would remain in the picture as engineers and contractors. . . ."

\* \* \*

298. On March 11, 1960, Larry Smith wrote a memorandum as follows:

"I called Paul Gilmore on the phone at the suggestion of Ham Beatty and talked about publicity in connection with our contract with The Austin Company. I said that as far as we were concerned that we believed in having as little as possible and that I thought it would be 30 or 60 days before we would have our financial relationships sufficiently straightened out in England to justify any comment on that, so I said that having in mind the fact that it might be necessary for The Austin Company to release something in order to preserve their public relations in Cleveland that we would leave it to them to make the announcement in any form that they wished because we were satisfied to have the minimum announcement and to have it phrased in a way that would put The Austin Company in the best local relationship."

\* \* \*

301. On April 29, 1960 Mrs. Ashcraft and Mrs. Powell accepted Harry Ratner's offer to purchase Nutwood for \$3,500.00 an acre on the recommendation of Petti and O'Neill. The total acreage was 175.189 and the consideration was \$613,161.00. Mr. Ratner nominated Ridge Hills Development Company, an Ohio corporation, to take title to the premises on his behalf. Ridge Hills, a corporation owned by Mr. Ratner and two asso-



ciates, Fred Stark (since deceased) and Leonard Fuchs, took title to Nutwood and is now the owner of the property, except for a portion which is now owned by Mr. Fuchs individually.

302. On April 29, 1960, Nutwood was zoned for residential use only, except for ten acres, fronting on Euclid Avenue, which were zoned for apartment use. These ten acres were a part of the property taken in January, 1961, by the State of Ohio for the location of the Euclid Spur and for approaches to and from said spur. The April 29, 1960 agreement for the sale to Ridge Hills Development Company contained no representations as to the zoning or conditions relating to rezoning of the property. Between September, 1963 and July, 1964 some portions of the Nutwood property not taken by the State of Ohio were rezoned as "Business," and "Multi-family."

303. Plaintiff Hilltop did not show the Smith analysis to the purchasers of Nutwood.

\* \* \*

311. On July 21, 1960 a front-page article in the *Cleveland Plain Dealer* announced the start of the Severance Shopping Center and mentioned that Smith was owner and developer of the Center. The *Cleveland Press* of the same day stated that Smith would develop the Center which it "is purchasing" from Austin and that Winmar Realty Development Co. of New York and Seattle will be exclusive leasing agent and property manager. Another article in the *Cleveland Press* of July 22, 1960, stated:

"Winmar will work for Larry Smith & Co. of Seattle."

\* \* \*

313. On July 27, 1960 Wilbert J. O'Neill prepared a draft letter to be sent by plaintiff Hilltop to Smith,

inquiring about Smith's interest in Severance. This letter was sent to Smith by Petti on August 2, 1960. It read as follows:

"Mr. O'Neill told me some time ago that the Austin Company had disposed of its proprietary interest in the Severance Millikin-Longwood development retaining only the design, engineering, and construction work. Now the Cleveland papers have announced that you have acquired control of the project. This is causing me real embarrassment with my clients. I understood, of course, at the beginning that you had made a survey of the Longwood site for the Higbee-Halle interests and that, if you found any conflict in giving me your appraisal and recommendations concerning the Nutwood site, you would so advise me, but I did not have in mind the acquisition of a proprietary interest by your company, which, of course, would produce a very serious conflict of interest in acting as adviser on the Nutwood project.

"Not knowing of this change in your position and in reliance on your January 7, 1960, report and our subsequent discussions here in Cleveland with Mr. Treiger, I advised my clients on a sale of the property, which they have made in accordance with this advice. My difficulty is further increased by the fact that our Regional Planning Commission has recently published a report indicating a substantial need for additional shopping center development in the vicinity of the Nutwood property.

"I shall appreciate a full explanation of your position."

\* \* \*

315. On August 9, 1960, Treiger prepared a memorandum captioned: Re: Letter of August 2 from Henry Petti—Lyndhurst, Ohio Nutwood Farms, stating:

"This memorandum is intended to serve as the basis for a discussion with Mr. Petti in Cleveland on August 10, 1960, predicated upon his letter of August 2nd.

- I. At the time of our undertaking the assignment late in 1959, I notified Mr. Petti of the fact that we were employed on a consulting relationship on a retainer basis with the Austin Company from the inception of the project's planning and that we were still actively working on the project. Mr. Petti authorized us to proceed against knowledge of that position.

At the time of our undertaking the analysis of Nutwood Farms, our only relationship to Severance Center was as a consultant.

*Our responsibility to a client, particularly under a long-term consultant relationship, cannot be less than it would be to ourselves under a propriety interest.* Consequently, the extent of a possible conflict of interest between alternate positions of consultant and/or owner would have absolutely no effect on our objectivity.

- II. Mr. Petti's letter refers to the Regional Planning Commission's report which indicated 'a substantial need for additional shopping center development in the vicinity of the Nutwood property'—about 450,000 square feet in areas NE-1 and NE-2 through 1970. These recommendations must be interpreted in light of the concepts and qualifications within which they were developed. The Commission's analysis is based solely on a ratio of retail space to population (30 square feet of shopping and convenience goods store area in business centers for each family). The report states that this yardstick represents 'overall planning and must be critically employed for individual . . . trade areas and shopping locations . . . and we caution against permitting the ratio to be employed for a single shopping center.'

Our report does not suggest that there is no further need in the northeast Cleveland sub-

urbs for additional retail space. Rather, our report concludes that because of competitive factors, there is a *negative potential* for regional shopping center development.

This conclusion is entirely consistent with the finding and recommendation of the Regional Planning Commission. Our study was based upon the potential for department store and apparel categories within a regional shopping center complex, thus, representing a different circumstance from scattered retail development or numerous smaller retail centers and business districts. Smaller centers are essentially oriented for *convenience*, a feature which cannot be completely matched by the large one-stop regional center, and hence smaller projects can be justified and can operate successfully within the overall regional trading area served by the regional shopping center. (As a matter of fact, we noted that a sufficient potential did exist for a smaller center at Nutwood Farms.)

III. In a recent telephone conversation, Mr. Petti referred to knowledge that a leading department store and leading chains are interested in shopping center developments within the Nutwood Farm area. This comment suggests that our finding on absence of potential would be in error. There are inherent distinctions between retailers' and owners' objectives. Often, the department store finds it necessary or desirable to establish a branch location for strategic reasons *in spite of competition* (i.e., to be represented in a market and to battle for a share of that market rather than foregoing it to competitors). The institutional objectives of the department store is not necessarily consistent with *investment* objectives of a landowner.

We know ourselves of at least one Cleveland department store interested in a new branch

substantially east of the Severance estate. We do not believe that there is a need for additional department store space in this particular suburban market and we further believe that the development contemplated would be relatively marginal in view of the competitive situation. However, in spite of our reasoning and conclusions, we are aware of the probability that this particular project will go ahead because of the store's conviction that such a move would benefit them.

A department store generally assumes that a volume of \$50 per square foot is fairly satisfactory in the early years of a branch store's operation. A typical department store rent represents 3% of sales, or about \$1.50 per foot on a \$50 sales volume. A rent of even 15% in excess of this, for example, would be \$1.72. In view of the fact that an 8% amortization on construction costs of say \$16.00 per foot would represent \$1.28 and taxes, insurance, maintenance, management and other overhead would represent another \$.40 to \$.50 per square foot of floor area, it can be seen that the 'costs' might run to at least \$1.70 or more. Investment results are thus not overallly optimistic from the owner's standpoint, even at levels regarded as satisfactory from the department store's standpoint.

Finally, it must be pointed out that *differences of opinion can exist* in connection with the same set of facts and our advice to you was developed on the basis of best efforts on our part on your behalf.

IV. Our Nutwood Farm analysis, in our opinion, was predicated upon very liberal allowances in all respects, since we wanted to be absolutely certain of our negative conclusions. The eastside of Cleveland is characterized by several extremely strong retail concentrations, particularly if we consider the soon to be de-



veloped Severance Center. Review of our report and of our summary letter today suggests a comparable conclusion to that expressed in the report."

316. On August 10, 1960, Treiger went to Cleveland and conferred with Messrs. Petti and O'Neill and stated Smith's position and left with them his written summary of August 9, 1960. He prepared a memorandum of the meeting as follows:

"I had dinner with Mr. Petti and Mr. O'Neal, the attorney for the family that originally owned the property at the time that we made the analysis. I had a memorandum which I had prepared and which had been typed by John Tierney's secretary in Cleveland, as the basis for the discussion. The substance of this memorandum, a copy of which I believe is in the files also, was as follows:

1. The responsibility to a client was no greater or less than to ourselves.
2. Our sole position at the time of our undertaking the work for Mr. Petti on the Severance Center was as a consultant.
3. Reflecting on the conclusions reached in our Nutwood Farm analysis at the present time, absolutely and 100% is confirmed at present.

"The situation from their standpoint is as follows: On the basis of our report they in turn recommended to the owners of the property to sell the estate. Subsequently, the new owners of the property are undertaking to get the property developed for regional shopping center purposes. Apparently there is very substantial interest on the part of some of the national tenants and, for that matter, one of the local department stores — I believe the May Company, knowing the way the May Co. is operated there in Cleveland I would say that the intent or possibility of interest might very well be well founded. Mr. O'Neal took the position that he was well informed of the fact that we had a consult-

ing responsibility to the Austin Company at the time that we undertook the work for them. However, under a condition of proprietary interest, the extent of the conflict of interest, and this is the important point, was greatly expanded, and we owed them an obligation to inform them of the fact that we were submitting our report under different circumstances than existed at the time that we undertook the work. It would then have been up to them to decide whether to accept our conclusions and our findings, or to seek other guidance in the matter, although they do not question the fact that they owed us the money and would have paid us in any event.

"I do not believe that they were satisfied as a result of the meeting, and it was left on the basis that we would get in touch again."

317. Smith did not, at any time before August 10 or 12, 1960, disclose to plaintiffs or Mr. O'Neill that Smith was negotiating to buy Severance from Austin or that it had bought Severance from Austin.

\* \* \*

319. On September 17, 1960, plaintiff Hilltop wrote a letter to Treiger as follows:

"As you know, our clients have been disturbed as a result of the disclosures by our local newspapers of your company's acquisition of the Longwood properties. Unfortunately, our recent conference did not tend to alleviate this problem in any way.

"In order that we may properly explain the exact situation to our clients, it is requested that you furnish us with certain background information relating to the acquisition of the Longwood properties. We should appreciate your informing us generally as to the transactions concerning your company's acquisition of the Longwood properties and also advising us of the following: The dates when The Austin Company was first ready to dis-

pose of its interest in the Longwood site; the dates during which negotiations were carried on by your company and The Austin Company for the acquisition of the Longwood property; and the actual date on which your company acquired the proprietary interest in the Longwood property.

“Furthermore, the question has been posed to us as to whether under your retainer with The Austin Company regarding the Longwood site your company had any responsibility for the promotion of the project in connection with the conducting of leasing negotiations and obtaining tenants for the proposed development.

“Ray, I believe that since our firm has been your client in this matter, we are entitled to a more complete picture of the background transaction than has been given us to date in order that we may more adequately explain the situation to our clients. Certainly, it would seem that your company and our company share a common ground concerning our obligations to a client in the operation of our businesses, particularly, since it is necessary for both of us to preserve and enhance our reputations as competent and responsible business organizations.

“We trust that you will do all you can to clarify this situation, and shall appreciate your earliest reply.”

There was no written reply to this letter; but there was a subsequent meeting on February 15, 1961, at which time the Review Memorandum (Ex. 10) was delivered to plaintiffs.

\* \* \*

323. On October 20, 1960, General Counsel for plaintiff Hilltop wrote a letter to Smith as follows:

“Our office is General Counsel for Hilltop Realty, Inc., which has consulted us in connection with your market study of the Nutwood Farms Site. We have been advised that a possible conflict of interest existed in your dealings with Hilltop Realty, Inc.

and its clients as a result of your interest in the Longwood properties.

"I understand that recently Mr. Henry Petti, President of Hilltop Realty, Inc., has written to you requesting certain information in order that Hilltop Realty, Inc. and its clients may be aware of the exact situation concerning your activities and interest in the Longwood properties. Without further reiterating the remarks made in Mr. Petti's letter to you, it is requested that you send either Mr. Petti or our office the information requested in Mr. Petti's letter so that all parties will be apprised of the situation and can take whatever action is appropriate. A sufficient period of time has elapsed since Mr. Petti's letter to you and he has been under certain pressure from his clients, so that your earliest reply will be appreciated."

There was no written reply to this letter; but there was a subsequent meeting on February 15, 1961, at which time the Review Memorandum (Ex. 10) was delivered to plaintiff.

\* \* \*

333. On February 15, 1961, defendants' attorneys in Cleveland called a meeting with Mr. O'Neill and Mr. Petti, and Mr. Zelman of the Cleveland firm that were and are Hilltop's General Counsel, at which time the "Review Memorandum" (Ex. 10) was given to plaintiff, without charge. The "Review Memorandum" was prepared by Smith and dated December 15, 1960. . . .

334. On April 27, 1961, Hilltop executed an agreement with The Ridge Hills Development Company giving Hilltop a one-year exclusive agency to find lessees or purchasers of the Nutwood property.

\* \* \*

337. On June 14, 1961, Petti sent a Nutwood brochure to Mr. David May of The May Department Stores Company of Los Angeles advocating Nutwood as "an ex-

cellent location for a May Company store." Mr. Petti expressed his "firm belief that our location is a 'blue collar,' and a middle income area as compared to your Cedar-Center location which caters to people in a much higher income bracket. I see little conflict as each of the trading areas is distinct in itself." Petti enclosed a map which shows the trading area of Nutwood as competitive with neither the May Company's store at Cedar-Center nor Severance Center.

### **III. EXCERPTS FROM TRANSCRIPT OF TESTIMONY**

#### **A. Excerpts from Testimony Bearing on Issue of Intent to Deceive (Specification of Error No. 1)**

JOHN W. MARSHALL, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A John W. Marshall.

Q Where do you live?

A 9408 Columbia Boulevard, Silver Springs, Maryland.

Q By whom are you employed?

A The United States Department of Labor.

Q In what capacity?

A I'm an economist.

Q How long have you been employed by the federal government in that capacity?

A Approximately three years, sir.

Q Were you the economic analyst for the Larry Smith Company on the Nutwood Farms memorandum in 1959-1960?

A I was.



MR. WHITE: May the witness be shown Exhibit 176, please.

(The exhibit was placed before the witness.)

THE COURT: Let's all keep our voices up.

Q (By MR. WHITE) Do you recognize that file?

A I do.

Q What is it?

A This is a listing of the effective competition to the Nutwood Farms trade area.

Q In whose handwriting are the sheets which show the percentages applied to determine effective competition?

A My own.

Q What factors did you take into consideration in determining the percentages of effective competition to be applied to Nutwood?

A The distance from the Nutwood Farms site, the size of the competing facility and the strength of the competing facility—

THE COURT: You say size of the competing facilities?

A Facility, sir. I'm speaking in the singular in each case.

THE COURT: I see, as to each one.

A Yes, sir. And the strength based on whether it was a nationally known chain or a regional chain.

Q (By MR. WHITE) What techniques or procedures did you use in determining the percentages to be applied?

A In most cases where there was strength of any kind, again with a sizable department store, I would

sketch trade areas in the rough on a piece of plastic with a grease pencil and see how far the arcs of these trade areas as estimated for a competing facility cut into the Nutwood trade area.

Q Was the methodology you used in working up the effective competition for Nutwood the same or different from other studies you worked on?

A It was the same.

Q Did you encounter any unusual problems in working up the effective competition for Nutwood?

A No, sir.

Q Did the effective competition percentages shown in Exhibit 176 represent your professional judgment as to the proper percentages to be applied?

A They did.

Q Did anyone in the Smith organization attempt to interfere with your exercise of that judgment?

A No, sir. Some modification of them came about as a result of review conferences, but these were very minor in all cases. This is a very usual technique.

THE COURT: Did anyone outside the Smith organization attempt to influence you?

A No, your Honor.

Q (By MR. WHITE) Did any of your superiors attempt to interfere with any of the judgments you made in writing Exhibit 29?

A I'll have to answer that in this way: When an economic analyst presents a report of this kind to their superior, which would be an account man, it is always subject to review by the report writer and the account man. This usually is perhaps language

or some particular item in a given area where the account man has familiarity but the report man does not.

Q To what extent can you remember reviewing the effective competition of Nutwood with Mr. Treiger?

A Well, this was reviewed, as I have stated, as a matter of course. The entire report would be reviewed.

Q What if any suggestions can you remember Mr. Treiger making in your review with him of the Nutwood memorandum?

A Two things come to my mind. One, the expenditure pattern on a per capita basis was altered in several cases. This was a give and take where one may have been lowered slightly and another store category raised slightly. Total expenditures for retail goods remained at the same level for each zone.

Another case, as I mentioned previously, was the slight modification in effectiveness of a given location. This might have been modified very slightly. I believe in the few cases where this was done they tended to go down rather than up, but perhaps I was a little more fearful of competition than Mr. Treiger was.

Q Can you give the Court an illustration of what you meant by adjusting the—was it per capita expenditure pattern?

A Well, for example my estimate in a given zone may have been that the per capita expenditure for let's say hardware goods was \$60 and for drugs perhaps \$75. It may have been that Mr. Treiger suggested that these be modified so that hardware would be \$55 and drugs would be compensated higher.

Q To what extent can you remember reviewing the Nut-

wood memorandum with Mr. Imus before it was submitted to the client?

A Oh, I spent most of an afternoon with Mr. Imus. It was customary in the Larry Smith office to have two senior people review all economic reports. It had been reviewed by Mr. Treiger and myself, and this was the second review.

Q Can you remember any particular subjects which you reviewed with Mr. Imus?

A Mr. Imus' review dealt mainly with techniques, magnitudes of numbers and their relationship. (Tr. 1667-71)

\* \* \*

Q When did you first learn that Larry Smith & Company was considering the purchase of an interest in Severance property?

A The best period in time that I could give you in that would be in the early summer.

Q Of what year?

A 1960, sir. (Tr. 1678)

THOMAS PAUL DARMSTADTER, DIRECT EXAMINATION  
By MR. WHITE:

Q Would you please state your name and spell your last name?

A Thomas Paul Darmstadter, spelled D-a-r-m-s-t-a-d-t-e-r.

Q Where do you reside?

A 5905 Bullard Drive, Austin, Texas.

Q What is your occupation?

A Real estate developer.

Q With what company are you associated?

A The Lumbermen's Company.

Q Of what city?

A Austin, Texas.

Q What is your position with the Lumbermen's Company?

A I'm vice president in charge of their Property Management Division.

Q What are your duties in this connection?

A Well, I look after the operations of their high rise apartments and also merchandise new projects.

Q In what area does the Lumbermen's Company operate?

A A national basis.

Q Did you do the field work on the Nutwood Farms study?

A I did.

Q Briefly would you describe the field trip you took to Cleveland as best you can remember it?

A I arrived in Cleveland on a Sunday evening, checked into my hotel, which was on an outlying portion of the Cleveland area close to Nutwood Farms. The next morning I called Mr. Petti's office and went by his office to introduce myself and tell him exactly what I was in the metropolitan area to do. We agreed to meet for lunch that afternoon.

After leaving Mr. Petti's office I proceeded to update the competition or the field sheets that I previously had from other studies and to obtain additional competition in the immediate area of the site. I also proceeded to contact various planning agen-



cies, local, county and federal, as well as the Highway Department and other private agencies in connection with obtaining information which would be utilized for writing the report.

The next day I proceeded to obtain competition on the outlying areas, that is, the two counties up along the lake as well as update the competition which I previously had, and also contact additional agencies with regard to economic data.

Q About how many such agencies did you contact?

A I would say in the neighborhood of fifteen — well, agencies, when I say agencies I mean private as well as public, about fifteen sources.

Q Did you encounter any unusual problems in doing your field work?

A No. (Tr. 1712-13A)

\* \* \*

Q (By MR. WHITE) Drawing your attention to Exhibit 175, the top sheets on the right-hand side, is that the field—I'll wait until you have it, Mr. Darmstadter. (Exhibit No. 175 was placed before the witness.)

Q Are those the field notes which you submitted to Mr. Marshall of your trip to Cleveland you have just described for us?

A Yes, sir. (Tr. 1714-15)

\* \* \*

Q Well, referring to your field notes and to these work sheets in Exhibit 82, do they represent your best judgment as to the conditions which you found in the field?

A Yes, sir.

Q Did any of your superiors in the Smith Company at-

tempt to interfere with your exercise of judgment in any phase of the work you did on the report?

A No.

Q Did anyone else?

A No.

Q When did you first learn that Larry Smith & Company was considering the purchase of an interest in the Severance property?

A The exact timing I do not recall, but I would say it was at least one year after we submitted the report to Hilltop Realty. (Tr. 1718)

TOM M. CRUME, DIRECT EXAMINATION

\* \* \*

Q Mr. Crume, I think when we recessed yesterday you had just described that when Mr. Treiger arrived in October 1959 you took a ride around the Nutwood property and its environs and returned to the Hilltop office.

A That is correct, sir.

Q Now, during that ride was there any period of time, if you recall, when you were alone with Mr. Treiger?

A Well, as I testified during my deposition, when we made the stop at the Mount St. Joseph Home For The Aged Mr. O'Neill got out of the car and at the time of the deposition I wasn't sure whether Mr. Petti was also out of the car, but I have determined since that time that he was, so—

Q Do you know the occasion for their getting out of the car?

A Well, it was a question of acquiring some fill dirt for the property, and Mr. O'Neill was seeking Mr. Petti's assistance in obtaining it.

Q Did they walk over to that area?

A Yes, sir, that's right.

Q Now, during this period of time did Mr. Treiger make any statement to you concerning the nature of his relationship with Austin and Severance?

THE COURT: Which time? Do you mean after O'Neill and Petti left or before?

MR. STEPHAN: When Petti and O'Neill had left and he was alone with Mr. Crume.

A Well, I can't say definitely that the remark was made while Mr. O'Neill and Mr. Petti were out of the car, but since neither of them remember hearing it I would think that that's the time that he made his remark to me.

Q (By MR. STEPHAN) In any event, what remark did he make as nearly as you can recall?

A In effect he says, "You know we have made the studies on Severance," and of course I did know, and he added, "And we are also" — or, "We are still consultants." (Tr. 479-80)

**B. Excerpts from Testimony Bearing on Issue of Materiality (Specification of Error No. 1)**

HENRY PETTI, CROSS-EXAMINATION

\* \* \*

Q At the time you hired Larry Smith & Company wasn't it your thinking that Nutwood was in an entirely different trading area from Severance?

\* \* \*

A I might answer it this way: I don't think it was an entirely different trading area, but it was a distinct trading area. The trading areas were quite distinct.

One was in a working class area and middle income class, whereas Nutwood was in what I called the carriage trade area, and I thought they were distinct, yes.

\* \* \*

Q (By MR. WHITE) Mr. Petti, if I may, on that last, did you misspeak yourself?

A Yes, I meant Severance. Longwood was in the carriage trade area. I'm sorry.

Q And Nutwood was in the working class area, is that correct?

A What we refer to as the blue collar or working class, middle income class, yes.

Q Would you refer to the Nutwood and Severance project sites as being in entirely different trade areas?

A No, I would not, because I don't think any trading areas are entirely within themselves. People come from many distances to go to different stores at different times. Although they are in the trading area, they are in an entirely different center.

Q As a matter of fact, wasn't it your opinion at that time when you hired Larry Smith & Company that Nutwood and Severance would be on each other's borders but that they were not in the same trading area?

A As far as the delineated physical trade area, yes, that was my thinking. I thought that they had just about reached each other and maybe slightly overlapped. That didn't mean that people from the Nutwood trading area would be precluded from shopping at Severance or vice versa.

Q But would it be fair to say that the two trading areas as such were distinct, in your opinion?

A That was my thinking, yes.

Q And that there was no substantial conflict between the two?

A That was what I believed. (Tr. 291-94)

\* \* \*

Q (By MR. WHITE) Mr. Petti, do you remember on the occasion of my taking your deposition, and I will ask that your deposition be placed before you—(Depositions were handed to the witness.)

Q Will you kindly refer to Page 231, line 25 of your deposition.

A I've got Page 231.

\* \* \*

Q (By MR. WHITE) Did I ask you then, so the record may be clear, on that occasion,

“Q It was your opinion that Severance was not within the Nutwood trade area, is that correct?”

And you answered,

“A I would say there would be some overlap. We were definitely thinking only in terms of the City of Euclid, Wickliffe, Willoughby, Eastlake, Mentor, the south of the Nutwood site maybe to a distance of a couple of miles possibly. If we had the right tenants we could move into Mayfield Road, but nothing south. I felt that they were on each other's borders but they were not in the same trading area.”

Did you give that answer to my question that occasion?



A Yes, that's exactly the way the deposition reads.

Q And you told Mr. O'Neill of your views, did you not ?

A I'm not sure that I told him, although it's possible in our discussion that I did.

Q Mr. Petti, on the occasion of taking your deposition at Page 232 starting line 10, did I ask you,

“Q Did you share all this with Mr. O'Neill?”

And your answer,

“A I think I did.”

A That's exactly what my previous answer was.

Q To the best of your recollection did you share these views with Mr. O'Neill?

A My answer is the same, I think I did.

Q Did you also share your views with Mr. Crume?

A I believe I would have. (Tr. 320-22)

**C. Excerpts from Testimony Bearing on Issue of Reliance (Specification of Error No. 1)**

HENRY PETTI, DIRECT EXAMINATION

\* \* \*

Q (By MR. STEPHAN) When you found in the report the conclusion that the potentials were negative as to a regional or intermediate shopping center, did you rely upon it?

MR. WHITE: Oh, I object to that, your Honor, on the grounds that I previously announced with respect to the testimony of Mrs. Ashcraft and Mrs. Powell. This is asking him the direct question that is one of the ultimate issues before the Court. He can certainly ask him what he did, what conversations he had with Mr. Treiger, but this question I'm sure is objectionable.

THE COURT: Well, you may be right. I am going to let him answer it, however.

THE WITNESS: Will you read the question back, please? I'm sorry.

THE COURT: The question was, did you rely on the report you received from Treiger.

A Yes, I did. (Tr. 234)

\* \* \*

Q (By MR. STEPHAN) What did you do after receiving that report, or to whom did you talk?

A I talked pretty much to the associates in my own office, particularly Mr. Tom Crume, who had worked with me very closely on this, and immediately we began to think of other uses for the property, inasmuch as the regional shopping center had been ruled out. (Tr. 235)

\* \* \*

Q (By MR. STEPHAN) As a result of the report did you discuss with Mr. O'Neill taking any other course of action with respect to the property?

A Yes, I did.

Q And what discussion did you have with him the first time you talked with him after receiving the telephone call or the report of January 4 or 8, 1960, to the best of your recollection?

\* \* \*

A First I would like to say that we got three copies of the report from Larry Smith & Company and I immediately sent one to Mr. O'Neill so that he had a copy of the report. When I visited him the next time I apparently showed my disappointment and immediately he began to talk about other uses for the property.

Q (By MR. STEPHAN) At the time that you talked to Mr. O'Neill, can you fix that date approximately, bearing in mind the dates of January 4, 1960 and January 8, 1960?

A No, I cannot for sure.

Q Was it before or after you received on January 13, 1960 an offer from Harry Ratner to buy the property?

A I would imagine it would be before, because, as I say, when I got the report I immediately sent him a copy of the report and we were in contact almost immediately.

Q Now, can you state whether or not Mr. Treiger subsequently came to Cleveland to discuss the content of the report with you?

A Yes, he did.

Q And what was the nature of the discussion at that time?

A Oh, pretty much he relating to us his disappointment in the negative conclusion. I think about that time I had worked up a schematic use in the interval of some other uses for the property, and we pretty much spent the time discussing that possibility.

Q At that time then had you accepted the conclusions with respect to the negative potential of the property for shopping center purposes?

A We had. (Tr. 238-40)

\* \* \*

Q (By MR. STEPHAN) When did you first consider the Ratner offer?

\* \* \*

A Well, we got into serious consideration after the

Larry Smith report. When it came in we gave it some consideration, yes, we did.

Q (By Mr. STEPHAN) When did you recommend to Mr. O'Neill that it be accepted?

A I believe after Mr. Treiger came to Cleveland and met with us on January 18th, I think immediately that night I prepared a letter and somewhere around January 20th I wrote to Mr. O'Neill and recommended that we accept the Ratner offer. (Tr. 244)

\* \* \*

#### CROSS-EXAMINATION

\* \* \*

Q Did you try to sell Nutwood as a regional shopping center after receiving the Smith report and before the sale to Ridge Hills on April 29, 1960?

A Sell it as a regional shopping center?

Q Yes, sir.

A No, I think we were thinking of alternate uses and trying to develop a syndicate amongst ourselves with the express purpose that maybe we could set aside sixty acres for some other use which in time might develop into a shopping center.

Q Mr. Petti, would you kindly turn to the second phase of your deposition, Page 43. Do you have it, sir?

A Yes, I have the page.

Q Starting at line 11,

“Q Just make it January 15th, Mr. Petti, after you received the Larry Smith report.

“A When you say we were holding it for strictly residential land, I think the fact remains that that's all we had, was strictly residen-

tial land, and I don't think we had anything more to offer the buying public.

"Q And you didn't try to sell it on any other basis?

"A We did not."

Did I ask you those questions and did you give me those answers at the time I took your deposition?

A Yes.

Q And were those correct responses to the best of your ability?

A I think there is a difference between trying to sell a raw piece of land that will become a regional shopping center development as against selling a regional shopping center piece of land that had the ingredients of the accomplishments that are necessary to make it that.

MR. WHITE: May the question be read back to the witness, please. (The reporter read the last question.)

A They were, to the best of my ability.

Q (By MR. WHITE) Specifically did you represent Nutwood to anyone representing Ridge Hills as appropriate for the construction of a regional shopping center within the same dates?

A When you say within the same dates, would you identify the dates?

Q Yes. After Mr. Treiger came to Cleveland on January 18, 1960 and up to April 29, 1960, which I think was the date of the sale to Ridge Hills.

A No, I don't think there was any need to represent anything. You remember that I had represented this land prior to the Larry Smith report to the Ratner people as a good regional shopping center site. It had potential. After that I had no reason to continue.



Now, if you're trying to differentiate between before and after the report, it is possible that after the report Fred Stark in particular thought that it was a good regional shopping center site.

Q You mean after the sale, don't you, Mr. Petti?

A Yes.

Q Not after the report but after the sale to Ridge Hills?

A Well, my memory there is a little fuzzy. I couldn't tell you I mean definitely as to when this took place. Mr. Stark's relationship with me was not very cordial at the time, mine wasn't with him, so I can't say that I done much representing to Mr. Stark at all.

Q Mr. Stark is deceased now, is he not?

A That's right.

Q And Harry Ratner is deceased now?

A That's right.

Q And to identify Mr. Stark, he was in effect a partner with Mr. Harry Ratner in the Ridge Hills Development Company as you understood it, isn't that correct?

A Not at the time of my negotiations with Harry Ratner. As a matter of fact, Harry Ratner didn't even want me to indicate to Fred Stark what the price was.

Q Well, Mr. Petti, now can you answer my question to the best of your knowledge when it became known to you that Mr. Stark had an interest in Ridge Hills?

A I had been told by Harry Ratner that they intended to bring Mr. Stark in as a partner if they were successful in acquiring the property.

Q Now, Mr. Petti, would you kindly turn to Page 413 of your deposition.

MR. STEPHAN: Is that 413?

MR. WHITE: Yes.

A I have it.

Q (By MR. WHITE) Did I ask the question which appears starting at line 21,

“Q Did you represent this property to the Raters as appropriate for the construction of a regional shopping center?”

“A I did not.”

Did you give that answer?

A Are you talking about after the report or before the report?

Q Did you misunderstand my question at that time?

A Well, I'd like to read the beginning of this, because I think somewhere we were differentiating before the report or after the report.

Q You may read as much as you wish.  
(Brief pause.)

MR. STEPHAN: I don't want to suggest any answer, but, Mr. White, may I inquire, if your Honor please, whether a number of pages earlier at Page 409, line 8, the beginning of your question, “This is March 1, 1960” relates to the question on Page 413 to which you refer?

MR. WHITE: That's correct.

Q (By MR. WHITE) Mr. Petti, I'm sure you will agree if you read the context that my question was within the context of between the time when you met with Treiger on January 18th in Cleveland and April 29th, the date of the sale to Ridge Hills. Did you understand my question in that way?

A If you're talking whether I represented this property as a regional shopping center between January 18, 1960 and the date of the sale, I said I did not.

Q Yes, and is that your testimony here today?

A Yes.

Q Would that include nonrepresentation to Karl Kammer, the attorney for Ridge Hills Development Company?

A When you say nonrepresentation, I'm not—

Q Did you represent Nutwood as a good regional shopping center site to Karl Kammer between those dates?

A Well, I think we'd have to go back to my relationship with Karl Kammer prior to this.

Q I think you can answer the question.

MR. WHITE: And I ask your Honor to have him answer the question.

THE COURT: Yes, I think that can be answered, Mr. Petti. You may explain after you answer if you need to.

A Well, I think about this time the Ratners felt that they had succeeded in getting us to deliver the property, and the only thing that they were interested in was in closing this deal and getting the property in their name. They needed no selling, they were anxious to acquire this property. I did not at that time need any selling tools or any pitch or any embroidering of this property to make a sale. The deal was being closed.

Q (By MR. WHITE) Mr. Petti, my question is a very simple, direct one. Namely, did you represent to Mr. Karl Kammer, a member of the Cleveland bar, Nut-

wood as a regional shopping center between January 18, 1960 and April 29, 1960 or not?

A My negotiations were not with Karl Kammer. Karl Kammer was an attorney and—

THE COURT: Now, just—

A I did not.

THE COURT: All right.

A To the best of my recollection I did not.

MR. WHITE: May I have Exhibit 348, please. (The exhibit was handed to Mr. White.)

Q (By MR. WHITE) So the record may be entirely clear, Mr. Petti, your testimony is that you did not represent Nutwood to anyone as a good site for a regional retail center or shopping center between the time you talked to Mr. Treiger on January 18 and the time of the sale on April 29, 1960, is that correct?

A At the time of the sale, the closing of the sale?

Q Well, April 29, 1960 is the date of the sale.

A I can't say. It's possible that Fred Stark coming into my office, who felt that he was very knowledgeable in commercial real estate, might have initiated some participation together with me. I had good knowledge of the Nutwood site, he had been successful in building for department stores, had the money, and might have wanted me to use our company in exposing this property, but I can't rightfully say as to whether it was then or maybe it was right after April 29th. There was a little bit of division between the thinking on Fred Stark and Harry Ratner as to this property.

Q Well, let's say other than to Fred Stark who is deceased, did you represent Nutwood Farms as a good

retail regional site between January 18 and April 29, 1960, to the best of your recollection?

\* \* \*

A It's very possible that I did.

Q (By MR. WHITE) To whom?

A I wouldn't remember to whom, but there was never any doubt in my mind that Nutwood was a good regional retail site, as for its location, as for its access roads, as for its ownership, and there were people in the business that could put these things together without needing a market studies. So it is possible, as I say, that I might have represented this to others as a good location for a good regional shopping center site.

Q In this interval?

A Well, now you've got me there. It's pretty difficult for me to pin point it at that interval.

\* \* \*

Q (By MR. WHITE) Did you represent Nutwood to Edward J. DeBartolo or one of his representatives after January 18, 1960 as a good regional retail site?

A Yes, I did.

\* \* \*

MR. WHITE: May this letter be placed before the witness, please. (A paper was placed before the witness.)

Q (By MR. WHITE) Mr. Petti, I show you what appears to be a letter dated January 29, 1960, three pages, and I ask you to refer to the third page and ask you whether that is your signature?

MR. STEPHAN: May I first of all, if the Court please, inquire if this letter comes from any file



heretofore tendered by either side and, if so, its date and page number.

THE COURT: It comes from one, as I recall, that was marked for impeachment purposes.

MR. WHITE: That's correct, your Honor.

THE COURT: Marked and sealed.

MR. WHITE: So your Honor and Counsel may follow my examination, I have extra copies. (Papers were handed to Mr. Stephan and the Court.)

Q (By MR. WHITE) Is this your signature on the third page of this document, Mr. Petti?

A It is.

Q Is this a letter which you sent to Mr. Galvin on or about the date it says, namely January 29, 1960?

A Yes, it is.

Q I notice that there is a copy shown to W. Savage. Who is he?

A I'm trying to remember this Savage, because there was an incident where some promoter came out of the blue, and Nutwood had been exposed to him by someone and he came to us and thought that he could put this thing together because he had contacts in New York or some such thing, but after borrowing twenty dollars from me I think I never heard from him again. I think the guy turned out to be a complete phony, and we did send him—he wanted this data, and inasmuch as we had it we sent him a copy of it.

Q Do you recall Mr. Galvin having called you shortly before January 29, 1960 and telling you that he had a prospect looking for undeveloped shopping center property?

A I think my contact with Peter Galvin came through his dad, Mr. Sidney Galvin, who was also familiar with the Nutwood site at the time when we were trying to interest Allied, and when I made known to Mr. Galvin that we might consider selling the Nutwood site outright, I think it was he that asked me to get in touch with his son or asked his son to get in touch with me, and that is how that contact was made.

MR. WHITE: May the question be read back, please.  
(The reporter read the last question.)

Q (By MR. WHITE) Can you answer my question, Mr. Petti?

A Peter Galvin had a party for shopping center property, is that what—

Q I'll repeat the question once more. Do you recall Mr. Peter Galvin having called you shortly before January 29, 1960 and telling you that he had a prospect looking for undeveloped shopping center property?

A I don't recall the call, but it's possible that it was made known to me that Peter Galvin had a prospect for shopping center property.

Q Do you remember telling Mr. Galvin at that time that Nutwood in your opinion had good potential for a major retail center?

A It's possible that I did, yes.

Q And this was after January 18, 1960?

A It would have been, yes.

Q And before April 29, 1960?

A Yes.

Q Didn't you as a matter of fact meet with Peter Galvin and Mr. Savage on or about January 25, 1960?

A Peter Galvin and Savage had no connection whatsoever.

Q Why was it then that you sent a copy of this letter to Mr. Galvin to Mr. Savage?

A To the best of my recollection Mr. Savage was brought to me by Bill Lyons, who was our accountant at the time, and he told me that this Savage was a very knowledgeable person and had contacts and thought that he could do something on Nutwood. I don't recall that it was Peter Galvin's prospect, because this Savage was a promoter type individual, and I think that was the reason that we upped the price on it to allow for commissions for either Savage or Mr. Peter Galvin.

Q Is it your testimony that you did not meet on or about January 25, 1960 with Mr. Galvin and Mr. Savage together to discuss Nutwood?

A I'm trying to recollect. I gave it no significance for a long time. It's just possible that we did meet together. I don't know what the connection was between Savage and Galvin, to be honest with you.

Q Could I refresh your recollection by saying that on that occasion you told them that Nutwood had good potential for a regional shopping center?

A I thought it had a great potential.

Q Well, did you or did you not tell Mr. Savage and Mr. Galvin on that occasion that it had a good potential for a regional shopping center?

A I think at that time we were exchanging ideas, and we agreed that it had great potential.

Q Do you mean Mr. Savage and Mr. Galvin told you they thought it had great potential?

A Well, Mr. Galvin was quite experienced in the real estate business, his dad was a very learned man, and I think, yes, between the three of us we were trying to see what we could do with this for a regional shopping center. There were others in the marketplace that were putting these things together over and above the recommendations of market analysts. Because we were ruled out, it didn't necessarily rule out everybody else.

Q Specifically, Mr. Petti, didn't you tell those two gentlemen on the occasion when you met with them in the last week of January 1960 that you thought this was a good retail center?

A I said it had good retail potential, the site, the access roads, the expendable income. If somebody wanted to hold it five, six, eight, ten years, yes, there was a lot of potential there.

Q Was Mr. Savage interested in buying this property for ten years hence?

A It's difficult for me to explain to you—Mr. Savage to anyone. He was a complete phony. He borrowed twenty dollars from me and I never saw him again. He gave me a phony address and a phony telephone number. It was a very interesting experience.

MR. WHITE: Would you read the question back, please, Mr. Reporter. (The reporter read the last question.)

A As I tried to tell you, Mr. Savage—

THE COURT: Now just a moment.

A No, he was not.

Q (By MR. WHITE) Mr. Petti, referring you to the second from the last paragraph of this Exhibit 348-A, doesn't it appear that you were offering the prop-

erty to Mr. Galvin and Mr. Savage for \$3,750.00 an acre?

A It does.

MR. STEPHAN: Excuse me. I understand that the envelope is Exhibit 348 containing impeaching material. Has this now been marked Exhibit 348-A?

MR. WHITE: I would ask that it be so marked.

THE COURT: It will be so marked.

MR. WHITE: And I would like to offer it, your Honor.

THE COURT: Any objection?

MR. STEPHAN: I have no objection, your Honor.

THE COURT: It will be admitted. (Exhibit No. 348-A was marked for identification and admitted in evidence.)

\* \* \*

Q (By MR. WHITE) Was it the Smith report which caused you to raise the asking price of Nutwood from \$3,500.00 to \$3,750.00 an acre?

A No, it was not.

Q You had previously never offered the property at that price, had you?

A No, we had not.

Q Did either Mr. Galvin or Mr. Savage ask to see the Smith report?

A I can't remember. We were perfectly willing to make it available to them, and so the letter states.

Q Did anything occur between January 18, the date of Mr. Treiger's conference with you in Cleveland, and January 29 to change your mind that Nutwood was suitable for a regional shopping center?



A I don't think anything changed my mind. The only thing was the report submitted to me that caused us to abandon our program. It didn't mean that somebody else couldn't take it on.

Q Well, specifically did anything occur between January 18 and January 29, 1960 which completely changed your view of Nutwood?

MR. STEPHAN: I object to that as repetitive. He just answered that precise question.

THE COURT: He doesn't get an answer to his questions, that's the trouble. Mr. Petti, I want you to pay close attention and answer the questions. We will make much better progress. Overruled.

MR. STEPHAN: May the question be read back?

THE COURT: Yes.

MR. STEPHAN: And will the witness kindly listen carefully and answer to the best of your ability. (The reporter read the last question.)

THE COURT: Is that the last question?

THE REPORTER: Yes, your Honor.

A Not that I can think of that completely changed my view of Nutwood, no.

Q (By MR. WHITE) Is it your testimony then, Mr. Petti, that you relied on the Smith report to the extent that it was favorable, namely, such aspects as good access, but did not rely on the negative aspect that there was too much competition?

A I think that was precisely my conclusion as to the report.

Q In fact on Page 2 of Exhibit 348-A, looking at the last sentence under No. Arabic II and quoting, so we may all have it before us,

“It is our considered opinion that this is the only location in the northeast area that is suitable for a regional center. If true, and we know of no other, this should provide insurance against significant competition of a regional nature.”

Did you believe at that time that Nutwood had no significant competition of a regional nature?

A Well, actually this was a letter, I think, that we had prepared before the report, and I think we merely sent it out almost verbatim at that time when somebody requested some information relative to Nutwood.

MR. WHITE: May the question be read back, please?

THE COURT: Yes. Pay close attention to it, Mr. Petti. (The reporter read the last question.)

A Yes, I did believe that it had no significant competition as a true regional site.

MR. WHITE: May this letter be—

Q (By MR. WHITE) First, did you carry on any other correspondence with anyone at Osterndorf-Morris Company?

A None that I can recall specifically, other than the fact of this contact from Peter Galvin.

Q Do you know Donald Cloak, the president of Osterndorf-Morris?

A I've met him, yes.

MR. WHITE: May this letter be marked as Exhibit 348-B, please.

THE CLERK: B, did you say?

MR. WHITE: B. (Exhibit No. 348-B was marked for identification.)

THE COURT: Do you have a copy?

MR. WHITE: Yes, I do, your Honor. (Papers were handed to the Court and plaintiffs' Counsel.)

Q (By MR. WHITE) Does the document which has been marked as Exhibit 348-B bear your signature?

\* \* \*

A Yes, it bears my signature.

Q (By MR. WHITE) Is this a letter which you sent to Donald Cloak of Ostendorf-Morris on or about June 12, 1959?

A It is. (Tr. 382-89, 391-402)

\* \* \*

Q (By MR. WHITE) Do you have Exhibit 235 in front of you?

A Yes, I do.

Q Is this a brochure which you prepared for the May Company on or about June 29, 1960?

\* \* \*

A Yes, it is.

Q (By MR. WHITE) Now, at the time you prepared this brochure did you believe that Nutwood was a good location for the development of a major retail center?

A I believe for the right people, yes, it could still have been developed as a major retail center. We were unable to do it. (Tr. 414-15.)

KARL D. KAMMER, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A Karl D. Kammer.

\* \* \*

Q (By MR. WHITE) Where do you live?

A 22888 Holmwood, H-o-l-m-w-o-o-d, Drive, Shaker Heights, Ohio.

Q What is your profession?

A Attorney at law.

Q What is your office address?

A 1020 Leader Building and 20020 St. Clair.

Q Of what bar associations are you a member?

A Cuyahoga County Bar Association, and Ohio State Bar Association.

Q How long have you been a member of the bar?

A Since 1953.

Q Would you sketch briefly for us your educational background?

A After leaving high school I attended Western Reserve University for three years and am a graduate of Cleveland Marshall Law School.

Q Are you a member of the board of directors of any financial institutions in the Cleveland area?

A Yes, the Euclid Savings Association.

Q In your duties on that board of directors do you have any occasion to deal with the valuation of real property?

A I'm a member of the executive committee of the bank and I pass on all loans that are made by the bank.

Q Have you in your practice tended to specialize in any field?

A I specialize primarily in real estate and corporate law. (Tr. 1632-33.)

\* \* \*

Q How long have you been secretary and counsel for Ridge Hills?

A Since sometime in 1960 when this corporation was formed.

Q Did you participate in the negotiations for the purchase of Nutwood Farms by Ridge Hills?

A Yes, I did.

Q When did the negotiations start?

A I believe it was sometime toward the end of 1959, the latter part of 1959 at any rate. (Tr. 1637.)

\* \* \*

Q (By MR. WHITE) Showing you what has been marked for identification as Exhibit 198-D and referring you particularly to the last page thereof, is that your signature?

A Yes, sir, it is.

Q What is Exhibit 198-D, ignoring for the moment the penciled notations on it?

A It's an offer to purchase.

Q What property?

A Approximately 170 acres known as the Nutwood property.

Q What is the date of the offer?

A I believe it's January 13, 1960.

Q By whom is the offer made?

A Harry Ratner or nominee. (Tr. 1638.)

\* \* \*

Q (By MR. WHITE) Do you know Henry Petti?

A Yes, sir, I do.

Q How long have you known Mr. Petti?



A I would say for at least eight or ten years.

Q How long before January 13, 1960, the date of Exhibit 198-D, how long before did you commence negotiations for the purchase of Nutwood?

A For at least a period of several weeks, perhaps a few months.

Q Did you have any meetings with Mr. Petti concerning Nutwood before the date of the offer of January 13, 1960?

A Yes, sir.

Q Can you tell us the circumstances which led to the offer of January 13, 1960?

A Well, after a series of meetings with Mr. Petti in regard to price, and so forth, on this property, we determined to make an offer based on the figure that is contained in the document.

Q During the period of negotiations leading to the offer of January 13th, did Mr. Petti make any statement to you or in your presence relative to any potential use of the Nutwood property?

A Yes, sir, he did.

Q What statements did he make?

A Well, he continually told us that this was one of the finest areas in perhaps the State of Ohio for a shopping center.

Q Did he make this statement on one occasion or more than one occasion in your presence during the negotiations before January 13th?

\* \* \*

A I would say on nearly every occasion that we met on these negotiations that the subject was brought up

and Mr. Petti made the remark that, "This is a great location for a shopping center complex."

Q Did he mention what kind of a shopping center?

A Regional type, something of a large nature.

Q Now referring you to the period between January 13th and April 29th when the record shows that Ridge Hills purchased the property, did you meet with Mr. Petti during that period?

A Yes, sir, we did.

Q What was the occasion for those meetings?

THE COURT: I didn't get those dates.

MR. WHITE: January 13th and April 29th, your Honor, the date of the original offer and the date of the purchase.

A The original offer had not been accepted and the negotiations continued based on determining the exact number of acres. There had been some error in the exact number of acres, and also it had been alluded to regarding the taking by the State Highway Department, and this taking was part of the second offer, certain moneys to be received in the event that the State Highway Department took that portion of the land after the Ridge Hills Development Company acquired it, and so forth, what happened to that money, and Mr. O'Neill, counsel for the seller, was very insistent upon something being put into the agreement regarding that.

Q Did you meet Mr. Petti at any of these meetings?

A Yes, Mr. Petti was at all the meetings.

Q Did Mr. Petti make any statements to you or in your presence at any of these meetings concerning the potential use of Nutwood?

A Yes, this was a continuation of the same type of usage for the property. It would be used for a regional shopping center, some sort of a complex.

Q On how many occasions do you think you met with Mr. Petti between January 13th and April 29th incident to these negotiations for the purchase of Nutwood?

A I would imagine three or four times.

\* \* \*

Q (By MR. WHITE) In your presence did Mr. Petti discuss at any of these meetings any work that he would do for you?

A Yes, he indicated a desire to be the leasing agent in the event we acquired the property.

Q Did he indicate what types of leases he might negotiate for you?

A Well, we at all times discussed the possibilities of department stores and other leases of a major nature.

Q Now, by these meetings did you understand, Mr. Kammer, that I was speaking of the period between January 13th and April 29th?

A Yes, sir, those were the ones that you were referring to previously.

\* \* \*

Q (By MR. WHITE) Did you or anyone else on behalf of Ridge Hills during this period between January 13, 1960 and April 29, 1960 tell Mr. Petti of the use to which you intended to put Nutwood?

A Yes.

Q What did you say?

A We had hoped to put Nutwood to use as a regional

complex consisting of a major shopping center of the regional type, a series of laboratories and a motel and perhaps bowling alleys and other sorts of commercial enterprises, and in one specific area some homes if possible.

Q At any time during the negotiations which led to the sale on April 29, 1960 did Mr. Petti in your presence ever express any doubt with respect to the use of Nutwood for a regional shopping center?

A Not at any time.

Q Did Mr. Petti present to you and Ridge Hills during the negotiations any studies or other materials concerning Nutwood?

A We had a series of plot plans that Mr. Petti presented us that had been prepared.

\* \* \*

Q (By Mr. WHITE) Showing you Exhibit 200-3, is the plot plan shown in this article in the Cleveland press of June 29, 1960 one of the plot plans submitted to you by Mr. Petti?

\* \* \*

A If it's not the exact one, it's a very close replica of it.

\* \* \*

Q (By Mr. WHITE) Can you tell us whether Mr. Petti presented to Ridge Hills in your presence plot plans similar to this in connection with the use of Nutwood before April 29, 1960?

A Yes, sir, he did.

\* \* \*

Q (By Mr. WHITE) Showing you Exhibit 235, and again recognizing that this bears date of June 29, 1960, can you tell us whether Mr. Petti during the

negotiations for the sale of Nutwood to Ridge Hills presented to you any material such as this?

\* \* \*

A I'm looking at Land Use Study C dated February, 1959. This is an exact replica of what was presented in the newspaper article. This was presented to us.

THE COURT: When?

A Between the dates of January 13 and April 29, 1960. (Tr. 1640-50.)

\* \* \*

Q (By MR. WHITE) For what period of time was Mr. Petti active in promoting Nutwood for Ridge Hills as a regional shopping center?

A I would say from the inception—

THE COURT: You mean for his company?

MR. WHITE: Yes.

A From the inception of our negotiations through the period of time that he was given an exclusive, which would bring it into 1960 to 1962. (Tr. 1652)

MILDRED WINSLOW ASHCRAFT, DIRECT EXAMINATION:

\* \* \*

THE COURT: Mr. Stephan, what are you seeking to establish by Mrs. Ashcraft's testimony?

MR. STEPHAN: Basically, your Honor, her reliance as a plaintiff upon the report of Larry Smith & Company in determining to sell Nutwood Farms to the Ratners after receipt of the report, Exhibit 29. (Tr. 77)

\* \* \*

Q If you had known in the spring of 1960 that Larry Smith was in the process of buying Severance, would you have determined to sell Nutwood?



A I—

MR. WHITE: Excuse me. Is that the end of the question?

MR. STEPHAN: Yes.

THE COURT: He hasn't let his voice fall yet, I don't know whether it is or not.

MR. WHITE: Your Honor, I have several objections to that question. In the first place, in form it is leading and suggestive. In the second place, it is self-serving. In the third place, it is just calling for a pure speculation.

MR. STEPHAN: Well, if your Honor please, in the first place it is not intended to be leading. In the second place, obviously anyone's evidence in a fraud case with respect to reliance may be what Mr. White characterizes as self-serving. You rely or you don't rely. And in the third place, there is nothing in it that is speculative or conjectural. It is to ask this lady to reconstruct a fraud situation and to ask her whether or not she would have sold the property. You must wait, Mrs. Ashcraft, until Counsel has been heard.

THE COURT: Is there something more you want to say, Mr. White?

MR. WHITE: No, your Honor.

A Well, I assume that if—

THE COURT: Just a moment. I have not ruled yet, Mrs. Ashcraft.

A Oh, excuse me.

THE COURT: I am going to permit her to answer.

A In the first place, I don't think if Mr. Petti or Mr. O'Neill—

THE COURT: Now just answer the question, Mrs. Ashcraft.

Q (By MR. STEPHAN) Just answer the question. If you had known independently that Larry—I think you understand the question.

A Yes. No, I would have been—I would not have. (Tr. 85-87)

\* \* \*

### CROSS EXAMINATION

\* \* \*

Q Would it have made any difference to you if you had known that Larry Smith & Company was still acting as advisers and consultants on the Severance property at that time?

\* \* \*

A I would have thought that if it was all right with Mr. O'Neill and Mr. Petti, then it was all right with us.

Q (By MR. WHITE) Would it have made any difference to you? I think your Counsel asked you whether it would have made any difference to you if you had known about certain facts. Now I am asking you whether it would have made any difference to you if you had known that Larry Smith & Company were continuing to act as advisers and consultants on the Severance property at the time they did the study for Hilltop.

MR. STEPHAN: I object to that on the grounds it is repetitive. She has just answered exactly that question.

THE COURT: Overruled. Do you know what the question is, Mrs. Ashcraft?

A I'm a little vague about it.

THE COURT: Why don't you restate it, Mr. White.

Q (By MR. WHITE) Did you know that Larry Smith & Company was acting as consultants and advisors on the Severance property in December and January, 1959-1960?

A I don't believe I did.

Q Would it have made any difference in your course of action if you had known that they were acting as advisers and consultants then?

A Not if it hadn't made any difference to Mr. O'Neill and to Mr. Petti.

Q Is it your testimony then that you would have no independent opinion about it?

A On this sort of matter I couldn't have. I wouldn't know that much about it.

Q So is it your testimony that you just relied completely upon Mr. O'Neill?

THE COURT: And Mr. Petti, she said.

Q (By MR. WHITE) And Mr. Petti?

A And Mr. Petti. Yes, it is. In matters of this sort I would have to. I was obliged to because this was the way it was set up and the way we wanted it to be. (Tr. 96-98)

\* \* \*

Q Where were you when you received this letter from Mr. O'Neill?

A Dated January 22nd?

Q Yes.

A I was in Madrid, Spain. (Tr. 99)

\* \* \*

Q In any event, Mrs. Ashcraft, you had not read the

Larry Smith report until this litigation commenced, is that correct?

A That is correct.

Q And the only information which you received about the Smith conclusions before you sold the property to Ridge Hills was in Mr. O'Neill's letter of January 22, 1960 to you, is that correct?

A We had conversations about it prior to that time.

Q Are you referring to a telephone call?

A No, personal conversations before I went away.

Q This was before Mr. Smith was hired. I'm talking about the Smith conclusions, Mrs. Ashcraft.

A I think—well, I don't know about the dates and all except it seemed to me that Larry Smith was an expert who was being called in to do this.

THE COURT: His question to you, Mrs. Ashcraft, was this: Did you ever consult verbally with Mr. O'Neill concerning the conclusions reached in the Smith report?

A No, except the letter that he sent us saying that it turned out badly.

Q (By MR. WHITE) This is the letter of January 22nd to which we have already referred, is that correct?

A That it turned out badly, yes. (Tr. 106-107)

AILEEN WINSLOW POWELL, DIRECT EXAMINATION:

\* \* \*

Q (By MR. STEPHAN) Did you rely upon the letter of January 22, 1960—upon what did you rely in deter-

mining to participate as a co-heir with your sister in selling Nutwood Farms?

A Well, I—

\* \* \*

A Oh. Yes. Well, I relied wholly on my sister and Mr. O'Neill.

Q (By MR. STEPHAN) Now, did you receive a copy of the letter of January 22, 1960?

MR. STEPHAN: Would you place before the witness Exhibit 198(a). (The exhibit was placed before the witness.)

A Yes, I got this when I was in St. Thomas. I received it from my sister. (Tr. 122-23)

\* \* \*

#### REDIRECT EXAMINATION

\* \* \*

Q (By MR. STEPHAN) Did you yourself see the Nutwood report of Larry Smith & Company?

A No.

Q From what source did you get information as to the contents of the Nutwood report of Larry Smith & Company?

A To the best of my recollection it was in this letter here that I got the copy of Larry Smith's letter.

Q Reference to it?

A Reference to it, and this second paragraph.

Q And by the use of the word "here" what are you referring to?

A It was sent to me in St. Thomas.



Q Yes, but by the use of the word "here" are you referring to this letter of January 22, 1960 that is before you?

A Yes.

\* \* \*

#### RECROSS EXAMINATION

By MR. WHITE:

Q Just for clarification, one question. You referred to a copy of the Larry Smith letter.

A I meant Mr. Petti's letter. (Tr. 138-39)

#### **D. Excerpts from Testimony Bearing on Issues of Justification for this Litigation and Measure of Punitive Damages (Specifications of Error Nos. 9 and 10)**

WILBERT J. O'NEILL, DIRECT EXAMINATION:

\* \* \*

Q Will you please tell me whether you have any recollection of a meeting held some time after learning that Larry Smith & Company had acquired a financial interest in Severance?

A Yes. Did you say, do I have a recollection of a meeting?

Q Right.

A Yes; Mr. Petti, and Mr. Treiger and I met at the Sheraton-Cleveland, I think, on the 12th of August, 1960, and Petti told me, when we were going down to the hotel to meet Mr. Treiger, that he had complained bitterly about their concealing from him the fact that when they accepted this employment they were already negotiating to buy the Severance Shopping Center, and on about the 1st of August it had been announced that they had acquired it.

\* \* \*

A Yes; Mr. Petti and I and Mr.—

Q The answer is "Yes"?

A Yes.

Q Now, if I had asked you what happened at that meeting, would the expanded answer just objected to have been given by you?

A Well—

MR. WHITE: I think he can answer that "Yes" or "No."

A It was much more direct than that.

Q All right. Tell us what happened.

A Mr. Petti told Mr. Treiger in very definite terms that they were shocked and surprised to learn that his firm had accepted employment to give its professional opinion on the suitability of Nutwood for a shopping center development at a time when they were negotiating to buy the Severance Shopping Center property.

Q Did Mr. Treiger offer any explanation?

A Yes; he offered the explanation—

Q Let's just answer the question. Did he offer an explanation?

A Yes.

Q Did he have with him a piece of paper, a copy of which has been so identified heretofore and marked as Exhibit No. 49?

A Yes; he did.

Q Will you tell me, without taking the time that I wish I could afford for you to read again this memorandum to refresh your recollection, your best recollec-

tion independently of taking that time, of what the substance was of Mr. Treiger's comments?

\* \* \*

Q Please continue, Mr. O'Neill.

A Well, I think I have already said that Petti indicated that they were shocked and surprised to learn that Larry Smith & Company had accepted employment from them when they were already negotiating —

Q Yes; you have.

A —to buy a neighboring and competing property, and Treiger —

Q Just a moment. Let me ask you a question. (Tr. 2638-41)

TOM M. CRUME, DIRECT EXAMINATION:

\* \* \*

Q (By MR. STEPHAN) In any of your discussions with Mr. Treiger or any representative of Larry Smith & Company were you furnished or informed concerning any underlying working papers until after this lawsuit was started?

A Well, there was some reference to working papers. We knew that they existed, but we were never furnished them.

THE COURT: Did you ever ask for them?

A No, sir. (Tr. 492)

JOHN MARINES RIENSTRA, DIRECT EXAMINATION

\* \* \*

Q What were the general conclusions of Larry Smith & Company in Exhibit 29 under each of these two methods?

A Under each of these two methods, the conclusion was that although the site was excellent, the access was perfect, the population was large enough and showed considerable growth, that in both cases, because of the available competition, the Nutwood Farms site was not expected to support any major type of regional development.

Q Were these methods acceptable methods, in your opinion, in the profession in 1959 and 1960?

A Yes, they were. (Tr. 1144)

\* \* \*

#### CROSS-EXAMINATION

\* \* \*

Q Do you understand the differences between facts on the one hand and estimates or opinions on the other in feasibility studies?

A Yes, I do.

Q And I believe on your direct you testified that you found that this Sears store at Shoregate had 40,000 square feet rather than 70,000 square feet, do you remember that?

A Yes.

Q Now, except for that finding about the Sears store did you find any substantial errors of fact as contrasted with judgments or estimates in the Smith memorandum?

A No, I would say that in general the facts as stated, I mean not including any projections or anything, that would be right. (Tr. 1229)

**E. Excerpts from Testimony Bearing on Issue of Authorization or Ratification of the Nondisclosure by Smith Partners, Laurence P. Smith, Frank Orrico and Frederick Arpke**

LAURENCE PATTEN SMITH, DIRECT EXAMINATION:

\* \* \*

Q Did you do any work personally on the Nutwood memorandum, Exhibit 29?

A No.

\* \* \*

Q (By MR. WHITE) Did you do any work personally on what has been called the review memorandum, Exhibit 10?

\* \* \*

A No.

Q Were you aware during the time that these two memoranda were in preparation that your company was doing or had done a feasibility study of Nutwood Farms for Hilltop Realty?

\* \* \*

Q (By MR. WHITE) Mr. Smith, assume that my last question to you is addressed to as of the dates say of January 1, 1961. Had you ever heard of either Nutwood Farms, Hilltop Realty or Henry Petti by that date to the best of your recollection?

A No.

THE COURT: What date?

MR. WHITE: I made it January 1, 1961, your Honor. That's all.

CROSS-EXAMINATION

By MR. STEPHAN:

Q Mr. Smith, when after January 1, 1961 did you first



hear of Hilltop Realty or Henry Petti or Nutwood Farms?

A I can't fix that certainly, but the first clear recollection that I have was when I was informed that litigation was in progress, and my secretary told me that and I asked her what it referred to and she said that there had been some discussions over a year or so previous to that. It would be some time probably in 1961 or '62.

Q Well, this lawsuit, I think, if Counsel will stipulate with me that the complaint was not filed until two years later, or January 4, 1963. Now, is it your testimony that you didn't know anything—

MR. STEPHAN: You will so stipulate, won't you, Mr. White?

MR. WHITE: Whatever the file shows. I'm sure it is January, 1963. As to the specific date, I don't know.

Q (By MR. STEPHAN) Is it your testimony, that you learned through your secretary sometime after—

\* \* \*

A Well, my first clear recollection was one when of my secretary, I believe it was Miss Bitz but I'm not clear on that, told me that litigation had commenced and she reminded me that I had been informed that there had been discussions about some complaint about some work that we had done that I should have known before, but I have no recollection as to when those discussions were. (Tr. 2379-82)

\* \* \*

Q (By MR. STEPHAN) Is there in your diary or time sheets any reference anywhere to Hilltop or Nutwood?

MR. WHITE: I will object unless some time is placed on it.

Q (By MR. STEPHAN) Up to January 4, 1963.

THE COURT: And by "diary" you mean his time sheets?

MR. STEPHAN: In Exhibit 233, your Honor, he makes reference to "my diary." Now, I don't know what—

THE COURT: Diary or time sheets, Mr. Smith, you may answer that question.

A There may be in the few months prior to that because, as I say, at the time that I was first informed of the litigation to an extent that I presently have recollection, when I raised the question as to what the so and so was about I was informed that there had one or two discussions before or that there had been previous discussions over a period of months. I don't know what the period was, and at that time I may have made a note that there was a discussion about something in a diary possibly in 1962, late '61. (Tr. 2386)

\* \* \*

Q (By MR. STEPHAN) Would you look at Exhibit No. 58-A, the cover sheet, being a letter from the Cleveland Counsel for Hilltop Realty dated about October 20, 1960, and tell me when that was brought to your attention?

A I don't believe there is any cover letter here. The first thing here is a letter—

Q Oh, I beg your pardon.

THE COURT: It is a letter dated October 20, 1960. There is only one part of that file that was admitted, 58-A.

MR. STEPHAN: Yes, I beg your pardon. (The exhibit was placed before the witness.)

Q (By MR. STEPHAN) When was that brought to your attention, Mr. Smith?

A This letter?

Q Yes, sir.

A This particular minute. I've never seen it before.

\* \* \*

Q (By MR. STEPHAN) Was this document made available to you, whether you have seen it or not?

A I can't tell from observing it. I have no way of knowing. I haven't seen it.

Q All right. (Tr. 2449-50)

\* \* \*

Q Did you have any knowledge at any time before the substantiating report was prepared that such a report was in process of preparation?

A No.

Q Such knowledge was available to you, was it not?

A If I had known that there was something to substantiate I suppose I could have asked and I could have found out whether it was. I didn't know that there was anything to substantiate. (Tr. 2452)

FRANK ORRICO, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A My name is Frank Orrico.

Q Where do you live?

A 1745 92nd Northeast in Bellevue, Washington.

Q Are you one of the defendants?

A I am.

Q Are you one of the partners of Larry Smith & Company?

A I am.

Q About how long have you been a partner?

A I've been a partner since the company was organized.

Q What services did you perform for the partnership or function did you fulfil in the fall of 1959 and the winter of '59-60?

A Oh, I sat primarily in partnership meetings dealing with policy matters. I was not engaged in any active consulting work at that time.

Q Are you also an officer of Winmar Realty Development Company?

A I am.

Q What office do you hold?

A I'm president of Winmar Realty.

Q What was your function with respect to Winmar during this same period of the fall of '59 and the winter of '59-60?

A I was responsible for the operation of the company and dealing with all of its service activities to—

THE COURT: Which Winmar Company are you speaking of?

A Winmar Realty Development Company.

Q (By MR. WHITE) Do you still have that function?

A I do.

Q When did you first hear of Nutwood Farms?

A I'm not exactly sure of the date, but it had to be some time after the fall of 1960.

Q Had you previously heard of Hilltop Realty Company to the best of your recollection?

A To the best of my recollection I had not, or did not.

Q Had you heard of Mr. Petti, the president of Hilltop?

A I did not.

\* \* \*

#### CROSS-EXAMINATION

\* \* \*

Q (By MR. STEPHAN) Can you fix more accurately than some time in the fall of 1960 the date when you first heard of Nutwood Farms?

A I cannot fix it exactly. I know that it had to be some time in the fall of 1960 because I do know who it was that first made me aware of the situation, and it happens to be an attorney in Cleveland and he is able to check as to when he found out about it, so he couldn't have told me about it before he knew about it and he found out about it in September of 1960, and as nearly as I can recall my first association with this particular individual was not until some time in the fall and winter of 1960.

Q I don't want to impinge on privileged documents or communications. Was this your own attorney?

A This was an attorney for Severance Center. Actually Severance—it was an attorney hired to engage in certain work for Severance Center, yes.

Q Then it was not your own attorney?

A Well, I don't know—for me personally?



Q Yes.

A No.

Q Who was it?

A It was Herb Spring of Baker, Hostetler.

Q Well, let me see. I understood in the record in this case that Herbert Spring of the Baker, Hostetler firm represented Larry Smith & Company in Cleveland, Ohio at that time. Am I mistaken?

A To my knowledge this could be — I'm not exactly sure. My recollection is that we were using Herb Spring in connection with Severance Center. We were in the formation of the various companies at that time and my recollection is that he was working for Severance Center.

\* \* \*

Q (By MR. STEPHAN) What did you hear in the fall of 1960 concerning Nutwood Farms?

A I would have to say that my memory isn't clear enough to say precisely what I heard. Actually, if I can recall exactly, I didn't even place much attention on what was said. I remember the name Hilltop at the time, that there was some question about some work that Larry Smith & Company had done for Hilltop, and I only recall it in that frame of reference, because I had no knowledge of what Hilltop meant or what we were doing with Hilltop. When I say we, referring to Larry Smith & Company.

Q As a member of the partnership concerned with policy matters, is a reading file made available to you in Seattle for your review?

MR. WHITE: I will object to that unless a time is placed on it, your Honor.

THE COURT: Oh, I will permit this as a general question.

A I would say that the—the reading file is not kept from me, it's available to me, but it's in an office completely separate from where I spend my time, and I have no occasion and I have not recently in the last few years had any occasion to go into the Larry Smith & Company reading file.

Q (By MR. STEPHAN) Well now, physically, if I recall it, your office was down the hall on the seventh floor of the Central Building in about Room 707, wasn't it?

A That's right.

Q And in that same building on the third and second floors were offices of Larry Smith & Company, were there not?

A That's right.

Q And Winmar is an affiliate of Larry Smith & Company, is it not?

A I would say by definition it's an affiliate of Larry Smith & Company, yes.

Q And from time to time you were doing your major work in Winmar Realty Development Company's office up on the seventh floor, then from time to time you were down in the third floor at partnership meetings or conferences?

MR. WHITE: I will object to the vague form of the question, your Honor.

Q (By MR. STEPHAN) During the fall of 1959.

THE COURT: All right.

THE WITNESS: Your Honor, am I to answer the question?

THE COURT: Yes, limited to the fall of 1959.

A Actually to say that from time to time that I worked in Winmar's office is not the case. I worked there all the time. To my knowledge I had no occasion to do any work in the Larry Smith office, and I believe that the record will show that most of the meetings that I attended as a partner of Larry Smith & Company were held in locations other than the offices of Larry Smith & Company, because as a matter of policy Larry Smith & Company's meetings are generally held outside the offices.

Q (By MR. STEPHAN) Well, all right. The reading file was available to you?

A It was not kept from me. I mean there was no special location for a reading file to be placed for anyone from the Winmar office to read, whether he was a partner of Larry Smith & Company or not. But as far as it being available in the sense that it wasn't kept from me, yes, it was available.

MR. STEPHAN: Exhibit No. 58, your Honor, was I think offered and then rejected on the grounds that it is cumulative, but it is the document which contains the Seattle file on Hilltop Realty. I have no purpose to reoffer it or to offer cumulative evidence, but it is a shorthand way of referring to a series of letters that have exhibit numbers.

THE COURT: I assume that your theory is that there is information in this file which should have brought these matters to his attention.

MR. STEPHAN: That's right, your Honor.

THE COURT: But he has indicated he did not read them.

MR. STEPHAN: That's right, your Honor.

THE COURT: What is before me now?

MR. STEPHAN: The request to tender Exhibit No. 58 to the witness for the sole purpose of enabling him to refresh his recollection.

THE COURT: All right, you may do that. (The exhibit was placed before the witness.)

Q (By MR. STEPHAN) Can you tell me by examining Exhibit 58, which begins with the first inquiry by Hilltop of September 14th and I think goes through late in the fall of 1959, the first information that you recall having been brought to your attention? Just give me the date of it and I can then identify it as an exhibit.

A I could say that I have never seen any of these until just now, that I've never had any occasion to.

Q That is, you have never seen any of these papers?

A No, I can say that up until — I would say within thirty days I have never seen the Hilltop Realty letterhead. I had no occasion to.

Q Well, have you ever seen any of the interoffice memoranda concerning it between Larry Smith & Company?

A No. I have not. To my knowledge I have not.

Q As a partner are you kept informed of potential sources of revenue through consulting work done by the company?

A Only in terms of gross amounts of volume by division, but not by account.

Q Did you have knowledge of the preparation of a substantiating report?

MR. WHITE: I believe that is the review memo-

random that has been referred to in these proceedings, your Honor.

THE COURT: Do you know what he means by that?

THE WITNESS: Yes, I know what he means.

THE COURT: All right.

A I was aware that something was being done, yes.

Q (By MR. STEPHAN) What were you aware of?

A I was aware after I had heard that this question had been raised, whatever the question was with Hilltop Realty, that we had been asked to go back and do some review work. The exact date of that review or the exact time of it I couldn't attest to, but I'm aware that it was necessary to go back and do some work. (Tr. 2094-2103)

\* \* \*

Q (By MR. STEPHAN) You knew then that some species of a review memorandum, as Counsel calls it, or a substantiating report, as the exhibits call it, was in process of preparation, did you not?

MR. WHITE: I will object unless the time is fixed.

Q (By MR. STEPHAN) Prior to the date that it was dated of December 15, 1959 [1960].

A No, I'm not sure, I'm not sure of the date as to when I became aware of it. You asked, I believe, whether or not I was aware that a review memorandum was either in preparation or had been prepared. My answer is yes, I knew that. I would say right now if I were to try to fix a date, I became aware of the review memorandum sometime in 1961, and for all I know now it might have been already delivered. I don't know the date that I became aware of a review memorandum.



Q You never looked at it yourself?

A No, sir. I had no occasion to. (Tr. 2107)

FREDERICK ARPKE, DIRECT EXAMINATION

By MR. WHITE:

Q Would you state your name, please?

A Frederick Arpke.

Q Where do you live?

A 401 Upland Road, Medina, Washington.

Q How long have you lived there?

A About twelve years.

Q Are you one of the defendants in these proceedings?

A I am.

Q For what span of time were you a partner in Larry Smith & Company?

A From the time of its organization until April, 1962.

Q Were you active in the partnership in the fall of 1959 and the winter of 1959-1960?

A I was a member of the partnership but not an active in consultant responsibilities.

Q What was your function for the partnership as of that time?

A I was a member of the partnership and in attendance, of course, at regular meetings of the partnership, such as annual meetings, but there were only two or three cases left because I was in the process of transferring to Winmar Realty Development Company.

Q Did you do any work on any of the reports which Larry Smith & Company did on the Severance property in Cleveland?

A No, I did not.

Q Did you do any work on a feasibility study done on Nutwood Farms in eastern Cleveland?

A No.

Q When to the best of your recollection did you first hear of Nutwood Farms?

A I can't pin that down by date because I have no vivid recollection of the project at all. I did know at about the time when the court case was threatened that this case was being threatened, but I couldn't tell you what date that was even.

Q Had you previously heard of Mr. Henry Petti or Hilltop Realty?

A No, I had not.

MR. STEPHAN: I object to that on the grounds of vagueness. Previous to what date?

THE WITNESS: Previous to the time that any legal case was instituted.

Q (By MR. WHITE) Or threatened, Mr. Arpke?

A Or threatened. (Tr. 2110-11)

\* \* \*

#### CROSS-EXAMINATION

By MR. STEPHAN:

Q Handing you, please, Exhibit 58-A, dated October 1, 1960, does that refresh your recollection that it was at about that time that you understood that legal action was being suggested?

A Well, Mr. Stephan, I've never seen this letter before, I'm not conscious of having seen this letter before. The letterhead is completely new to me. I

don't recognize any of the names. I don't even see my name on here that it has been checked. If it has, it certainly was a very cursory one. This is a completely new document as far as I'm concerned.

Q You recognize on it the distribution stamp of the Seattle office, don't you, including Winmar?

A Yes, I see the stamp there, but I don't see that I have checked my name on it.

Q Was your office in the Larry Smith & Company office on the third floor of the Central Building?

A Not at this time I don't believe. I moved during this period to the seventh floor. For a long time, of course, I was right across from you on the seventh floor.

(Tr. 2113)

\* \* \*

Q Did you know that on or about December 15, 1960—

MR. STEPHAN: May I have Exhibit 10, please. (The exhibit was handed to Mr. Stephan.)

Q —A so-called substantiating report or review memorandum was prepared?

A No, I do not know about that.

THE COURT: Is that the date it bears?

MR. STEPHAN: Yes, your Honor. It bears the date of December 15, 1960, but it is an agreed fact and borne out by the records on both sides that it was not tendered to us until February 15, '61.

THE COURT: Yes, I understand that. In your question I thought you said October.

MR. STEPHAN: Oh. Then I misspoke.

Q (By MR. STEPHAN) Have you seen Exhibit 10?

A I have not. (The exhibit was handed to the witness.)

Q You have had no connection with this partnership since 1962?

A No, not a direct connection, no.

Q And you are now semi retired, are you not, Mr. Arpke?

A That's a good word for it, yes. (Tr. 2115-16)





IV. FULL TEXT OF EX. 29.

SHOPPING CENTER OPPORTUNITIES

AT NUTWOOD FARMS

CAUSE

5762

~~EXHIBIT~~ 29  
~~ADMITTED~~

JUL 28 1965

Prepared for

Hilltop Realty, Inc.

January 8, 1960

Larry Smith & Company  
1208 Dupont Circle Building  
Washington, D.C.

# LARRY SMITH & COMPANY



REAL ESTATE CONSULTANTS

1000 DUPONT CIRCLE BUILDING WASHINGTON 4 D C . PHONE ADAMS 4-6001

January 3, 1960

Hilltop Realty, Inc.  
3000 Mayfield Road  
Lyndhurst, Ohio

Attn: Mr. Henry Focht

Re: Nitwood Farms

Dear Henry:

The attached memorandum summarizes our deliberations with respect to the potential for regional or intermediate shopping center development at the above property, as per our conversation earlier this week.

As I indicated to you on the telephone, our analysis indicated an absence of a sufficient potential to justify either of the above assumed developments, at least through 1970. The reasons for these findings are explained in detail in the memorandum. In summary however, the following points can be considered.

- 1) The population of the trading area is, in itself, sufficient to generate substantial retail spending.
- 2) The site enjoys regional access. In fact, upon the completion of the contemplated highway improvements, the site's accessibility throughout the trading area can be described as excellent.
- 3) Total retail spending by trade area residents is substantial. In view of the distance of the trade area from downtown Cleveland, it can be expected that very substantial portions of total spending will be retained by local facilities, (as opposed to facilities in downtown Cleveland). Thus, the potential for suburban facilities is very significant.
- 4) Competition, particularly in the department-store-type-merchandise categories is very substantial. Over a million square feet of department store space exists or is planned in the eastern suburbs of the Cleveland metropolitan area.

The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms.

\* \* \*

In order to be certain of our conclusion, we have checked and double checked the analysis. Frankly, it is the opinion of the office that the trading area assumed in the analysis is extremely liberal, in terms of its size. You will see in the attached maps, the area extends out toward the east some twenty to twenty-one miles. Normally, our experiences indicated a maximum reasonable zone of penetration, even where we find an absence of significant competing facilities, in the neighborhood of fourteen to fifteen miles.

Further, we have utilized what we believe are maximum suburban shares, in terms of future department store spending of trade area residents. Finally, we have discounted quite substantially the existing or soon to be developed department store facilities which will be competing with those facilities at Nutwood Farms. Such competition between the existing and planned facilities and those which might be developed at the subject location will, in fact, exist, in spite of the fact that the trading area which is analyzed with respect to Nutwood Farms extends toward the west from the site only a very short distance. In other words, these facilities will exert significant competition influences, even in spite of distance, simply because of the strength and extent of the developments and facilities which are available for comparison shopping purposes.

We have tested the conclusions, also, on the basis of assumed "shares-of-the-market", which assume that facilities can be attracted to the site, in spite of the competition. We attempt to estimate the reasonableness of those facilities attracting the sales which would be necessary in order to make their tenancies attractive from the standpoint of the owner-investor. Again, our analysis proves negative.

In summary, our study indicates an absence of a sufficient volume potential to justify the interest of major tenants, and the absence of a sufficient investment opportunity to justify the development from the standpoint of the property owners.

\* \* \*

A similar analysis is included for your consideration with respect to an intermediate center. Again, our conclusions are not sufficiently favorable to justify continued exploration of this avenue of development with respect to Nutwood Farms.

Page 3

It is our opinion that, in spite of the fact that these findings are described herein as being preliminary in nature, they are sufficiently accurate and reliable with respect to the judgments expressed that they would not be substantially changed by continued work on our part. We therefore are putting this material in your hands for your study, and suggest that you may wish us to cease the work at this point, rather than to carry it to its conclusion, in the preparation of a formal report. If you should wish us to cease, we would, of course, not expect to charge you for the full appropriation, as per our proposal letter. Through the present time, our costs on this are in the nature of \$2,750.00 plus or minus.

I will be in touch with you in a few days so that we can talk about the work itself and so that you can instruct us further.

Yours sincerely,

LARRY SMITH & COMPANY

*Ray S. Treiger*  
Ray S. Treiger

RT/zt

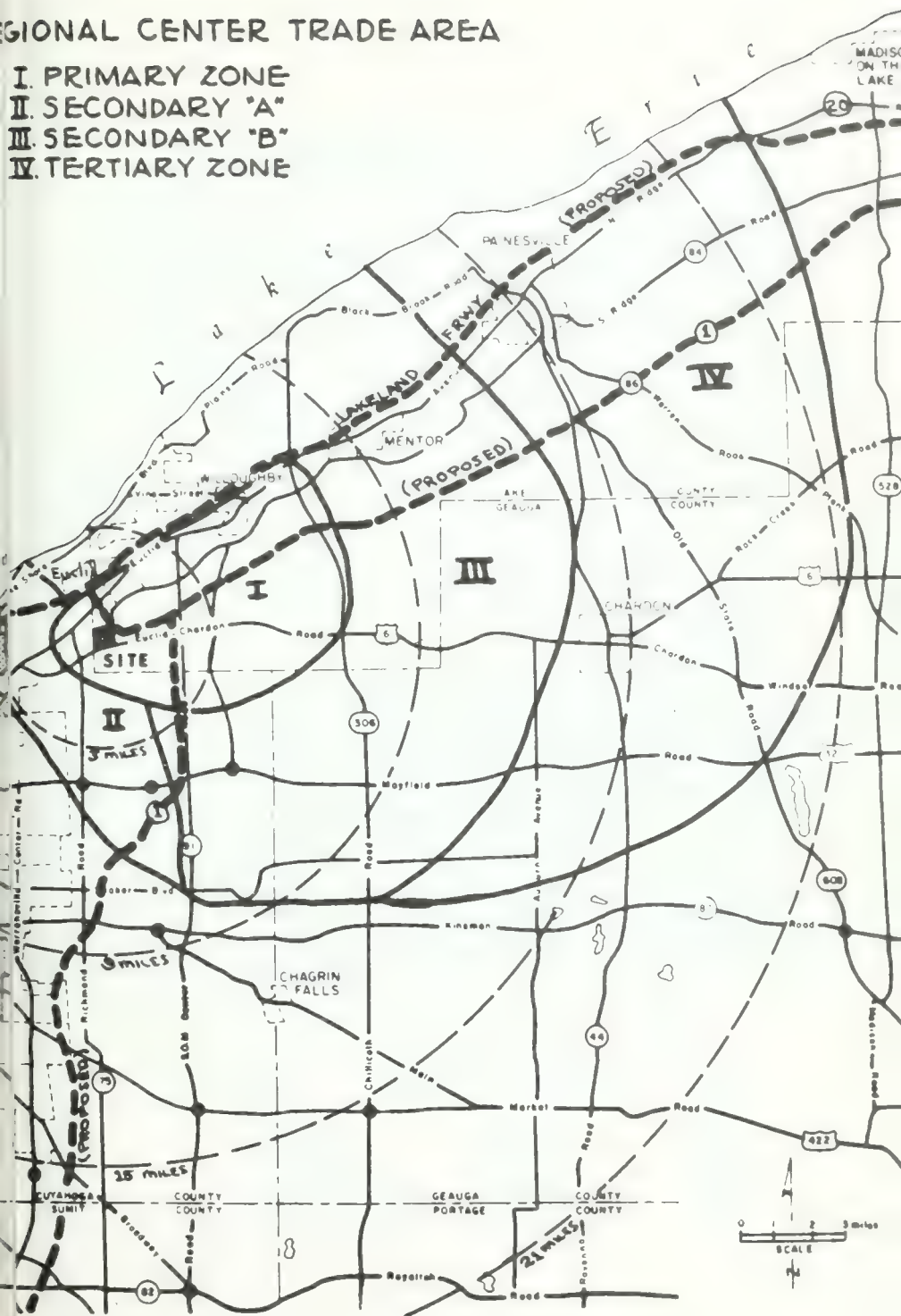
P.S. In the memorandum which follows, we have included the calculations only insofar as the department store and apparel categories are concerned. Our reason for limiting the memorandum to these two categories is that the potential in these lines of merchandise pretty well determine the extent of the total development which is justified. Our work sheets, of course, have been carried forward with all merchandise categories having been analyzed.

We have also, by the way, made an analysis for a neighborhood center. It is our opinion that a neighborhood center (i.e. one featuring convenience goods, primarily) can be developed at the subject location. However, it is our recommendation, based on the analysis to date that the development of a neighborhood shopping center be postponed until the following;

- a) Development plans, at least, are formulated for the balance of the property, and
- b) the planned highway improvements are carried forward.

## REGIONAL CENTER TRADE AREA

- I. PRIMARY ZONE
- II. SECONDARY "A"
- III. SECONDARY "B"
- IV. TERTIARY ZONE





## SECTION I

### ANALYSIS FOR A REGIONAL SHOPPING CENTER

#### Site and Access

The subject property, as indicated on the map opposite, consists of 140 acres situated on the northwest corner of Chardon Road (U.S. Highway 6) and Bishop Road (Ohio State Highway 84) in Lake County, about three miles east of the city limits of Cleveland.

This Nutwood Farms site is located adjacent to the proposed Euclid spur connecting Ohio State Route 1 (North-South Freeway) with the Lakeland Freeway. These two freeways have not been constructed to date, but it is estimated by the Ohio State Highway Department that the Euclid spur would be open to traffic by the end of 1962.

Access to the site may be considered to be excellent. The property will have frontage on the three highways mentioned above (Routes 6 and 84 and the spur connecting the two freeways), plus excellent access from Euclid Avenue (U.S. 20), a major six-lane artery, via the Euclid spur. The highway department has indicated plans for a four-ramp cloverleaf at the point where the Euclid spur crosses Bishop Road (Route 84). Thus, easy egress from the spur to the site will be available.

#### The Trade Area

The trade area tributary to a shopping center is dependent upon the size of its principal traffic generator. In the case of a regional shopping center, the principal tenant is assumed to be a strong department store. The specific trade area for any shopping center is limited by various factors including driving time and accessibility, population distribution, geographical and psychological barriers such as lakes and railroads, and the location of existing competitive facilities. As indicated on the map opposite, four zones have been recognized within the over-all trade area for a regional shopping center at the Nutwood Farms site. This zonal division of the trade area reflects variations in the drawing power of a development within its over-all area of influence and the proportionate weight of the factors affecting the shopping center in each zone.

As indicated on the map showing the trade area for a regional shopping center at the subject site, it may be seen that the primary zone extends

approximately seven miles outboard from the site. Secondary Zone A is that portion of the trade area closest to downtown Cleveland; the residents of this zone are also closer to other suburban shopping facilities and have, for the most part, existing shopping habits which will tend to carry them away from the proposed center. Secondary Zone B extends outboard from the site about thirteen miles, while the Tertiary Zone, containing those portions of the trade area most distant from the site, extends outboard some twenty-one miles.

### Population

The projected population of the trade area for a regional shopping center at the Nutwood Farms site has as a basis figures compiled by the Cleveland Electric Illuminating Company.

#### Regional Trade Area - Population

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	55,500	63,100	77,300
Secondary A	65,700	71,600	83,400
Secondary B	99,300	115,200	143,900
Tertiary	<u>55,500</u>	<u>62,800</u>	<u>74,600</u>
<u>Total</u>	<u>276,000</u>	<u>312,700</u>	<u>379,200</u>

From the table above it may be seen that the trade area is anticipated to experience considerable future growth. By 1970, population is expected to increase to 379,200, an anticipated growth of approximately 59% over 1959. It should be noted, however, that while the population of the primary zone is estimated to increase about 62% between 1959 and 1970, it will contain, even by 1970, only 20% of total trade area population.

### Income and Expenditures

Income data have been developed for the four zones of the trade area and have been determined as a basis for calculating retail potential. It should be pointed out that the information below pertains to the year 1958 which is, at present, the latest year for which complete data concerning income rise are available.

#### Average Income Levels - 1958

<u>Zone</u>	<u>Per Family and Unrelated Individual</u>	<u>Per Capita</u>
Primary	\$ 8,600	\$ 2,615
Secondary A	\$ 9,830	\$ 2,970
Secondary B	\$ 8,300	\$ 2,440
Tertiary	\$ 7,175	\$ 2,315
<u>Total Trade Area</u>	<u>\$ 8,465</u>	<u>\$ 2,585</u>
Cleveland Metropolitan Area	\$ 7,850	\$ 2,670

The variations in the relationship of per capita to per family and unrelated individual incomes which can be seen in the table, are due mainly to the fact that some portions of the trade area were found to possess families of a larger size than were others.

The table indicates the per capita incomes in the Primary and Secondary A Zones to be about the same or above the average for the Cleveland metropolitan area, while the average per capita incomes of the Secondary B and Tertiary Zones are somewhat below the metropolitan area average. The lower incomes in these latter two zones may be attributed to the partially-rural nature of these zones.

Based on the income data above and the 1954 Census of Business, a per capita expenditure was estimated for the department store and apparel categories in each zone of the trade area. The resulting department store and apparel store sales potentials are discussed in the following paragraphs.

#### Sales Potential

The total department store and apparel sales potential represents the sum of all expenditures made by trade area residents in department and apparel stores both within and beyond the trade area now being discussed. This total potential is developed as the result of the multiplication of per capita expenditures by population.

#### Trade Area - Total Department Store Sales Potential (000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 8,880	\$10,096	\$12,368
Secondary A	\$11,826	\$12,888	\$15,012
Secondary B	\$13,902	\$16,128	\$20,146
Tertiary	\$ 7,215	\$ 8,164	\$ 9,698
<u>Total</u>	<u>\$41,823</u>	<u>\$47,276</u>	<u>\$57,224</u>

#### Trade Area - Total Apparel Store Sales Potential (000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 4,162	\$ 4,732	\$ 5,798
Secondary A	\$ 5,913	\$ 6,444	\$ 7,506
Secondary B	\$ 7,448	\$ 8,640	\$10,792
Tertiary	\$ 4,162	\$ 4,710	\$ 5,595
<u>Total</u>	<u>\$21,685</u>	<u>\$24,526</u>	<u>\$29,691</u>

It is recognized that despite new shopping facilities in the above selected categories within the trade area, that a certain percentage of total

department and apparel store sales potential will continue to go to facilities in downtown Cleveland. The portion of the total department and apparel store sales potential which is expended outside the central business district is referred to as the suburban share. A suburban share indicating the amount of these expenditures which could reasonably be obtained by suburban facilities has been estimated for each zone of the trade area and is shown in the table below:

Trade Area Department Store Suburban Share  
(000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>	<u>Suburban Share</u>
Primary	\$ 5,772	\$ 6,562	\$ 8,039	65%
Secondary A	\$ 7,096	\$ 7,733	\$ 9,007	60%
Secondary B	\$ 9,731	\$11,290	\$14,102	70%
Tertiary	\$ 5,411	\$ 6,123	\$ 7,274	75%
<u>Total</u>	<u>\$28,010</u>	<u>\$31,708</u>	<u>\$38,422</u>	

Trade Area Apparel Store Suburban Share  
(000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>	<u>Suburban Share</u>
Primary	\$ 2,913	\$ 3,312	\$ 4,059	70%
Secondary A	\$ 3,843	\$ 4,189	\$ 4,879	65%
Secondary B	\$ 5,586	\$ 6,430	\$ 8,094	75%
Tertiary	\$ 3,122	\$ 3,533	\$ 4,196	75%
<u>Total</u>	<u>\$15,464</u>	<u>\$17,514</u>	<u>\$21,228</u>	

A portion of the suburban retail potential is currently being absorbed and will continue to be absorbed by existing retail facilities both within the somewhat beyond the trade area. This situation is, of course, expected to continue even after development of the proposed shopping center. A field survey of these facilities was recently made in order to determine their characteristics as a basis for estimating the sales volume which they may be able to obtain from within the trade area after the development of the proposed center.

Estimates of the effective sales capacity\* have been made, and it is noted that the existing and announced department store facilities would be capable of obtaining over \$41,255,000 from within the trade area, while the effective sales capacity of apparel stores is estimated to be over \$23,675,000.

\* See appendix for definition of terms.

The table and facing map on the following page indicate the location of the major existing competitive facilities which will draw at least a portion of their sales volume from within the trade area.

Deducting the effective competition from the total suburban sales potential results in an unsatisfied potential which can be interpreted as an indication of the need for additional facilities of the selected types within the trade area.

Unsatisfied Department Store Sales Potential  
(000's)

<u>Zone</u>	<u>Effective Competition</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 7,917	--	--	\$ 122
Secondary A	12,779	--	--	--
Secondary B	15,294	--	--	--
Tertiary	<u>5,465</u>	<u>\$ 146</u>	<u>\$ 855</u>	<u>\$2,309</u>
<u>Total</u>	<u>\$41,255</u>	<u>\$ 146</u>	<u>\$ 855</u>	<u>\$2,431</u>

Unsatisfied Apparel Store Sales Potential  
(000's)

<u>Zone</u>	<u>Effective Competition</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 5,754	--	--	--
Secondary A	7,244	--	--	--
Secondary B	8,375	--	--	--
Tertiary	<u>2,494</u>	<u>\$ 718</u>	<u>\$ 1,122</u>	<u>\$ 1,792</u>
<u>Total</u>	<u>\$23,677</u>	<u>\$ 718</u>	<u>\$ 1,122</u>	<u>\$ 1,792</u>

As may be seen in the figures above, the only unsatisfied department store potential prior to 1970 is the far distant tertiary zone. By 1970, only a token market potential appears to exist in the department store category in the primary zone. A nearly similar situation is found in the apparel category, except that even by 1970, only the tertiary zone offers an unsatisfied volume potential. It is at this point that the present discussion with regard to a regional shopping center at the Nutwood Farms site, becomes of a negative nature.

In a positive analysis, any significant unsatisfied sales potential would be further examined and reduced to a level which experience has shown an indi-



# COMPETITION



EXISTING AND ANNOUNCED DEPARTMENT STORES  
IN THE NUTWOOD FARMS AREA\*

<u>Map Location</u>	<u>Store</u>	<u>Estimated Size (Square Feet)</u>
1.	Federal Sears (Honeygate)	72,000 70,000
2.	Bailey (E 22nd - Main Center)	57,400
3.	Higbee Halle (Lincoln)	250,000 130,000
4.	May Halle (Cedar Center)	293,400 16,500
5.	Bailey Sears (E 105 <sup>th</sup> )	29,000 232,000
6.	Halle (Hudson Square)	32,300
7.	Federal (Hudson Square)	103,500
8.	Sears Taylor Penney (Honeygate)	174,900 59,600 64,300
9.	Atlantic Mills (Atlantic Mills)	105,000
10.	Bailey Penney (Honeygate)	75,000 19,500
11.	Carlisle-Allen Sears Gail A. Grant (Parsippany)	43,200 33,000 23,400

\* It is acknowledged that several of the above locations (e.g. # 8 and # 9) are beyond the established trade area for the Nutwood Farms site. However, because of the strength of these distant locations, limited recognition has been given to them in the compilation of effective competition in this discussion.

vidual location could likely obtain. No single store or group of stores can expect to attract the total unsatisfied potential of any given trade area for any considerable length of time.

#### Share-of-the-Market Approach

In view of the negative implications of the preceding analysis, it was felt that it would be important to check the above findings. This is done through the use of a second method of developing data concerning volume potential available for major retail facilities in the proposed shopping center. This method, which is known as the share-of-the-market method, is based on a more aggressive approach in which it is assumed the department store tenant would be able to compete for a given share of the total suburban market of the trade area, more or less regardless of the extent of other competitive facilities already serving the area.

#### Department Store Share of the Market (000's)

<u>Total Suburban Potential</u>			<u>\$</u> <u>Share</u>	<u>Dept. Store Vol. Potential</u>		
<u>1962</u>	<u>1965</u>	<u>1970</u>		<u>1962</u>	<u>1965</u>	<u>1970</u>
\$28,010	\$31,708	\$38,422	5%	\$1,401	\$1,585	\$1,921
--	--	--	10%	2,801	3,171	3,842
--	--	--	15%	4,202	4,756	5,763

It will be noted that in each instance in this discussion, the mid-point share of the market (10%) was used to indicate estimated department store potential for the Nutwood Farms location. Translation of the above sales volumes available into actual warranted department store area on the basis of stabilized sales levels of \$55 to \$65 per square foot indicates the following:

#### Warranted Store Area (Sq. Ft.)

<u>Sales Level</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
\$55/Sq. Ft.	51,000	58,000	70,000
\$60/Sq. Ft.	47,000	53,000	64,000
\$65/Sq. Ft.	43,000	49,000	59,000

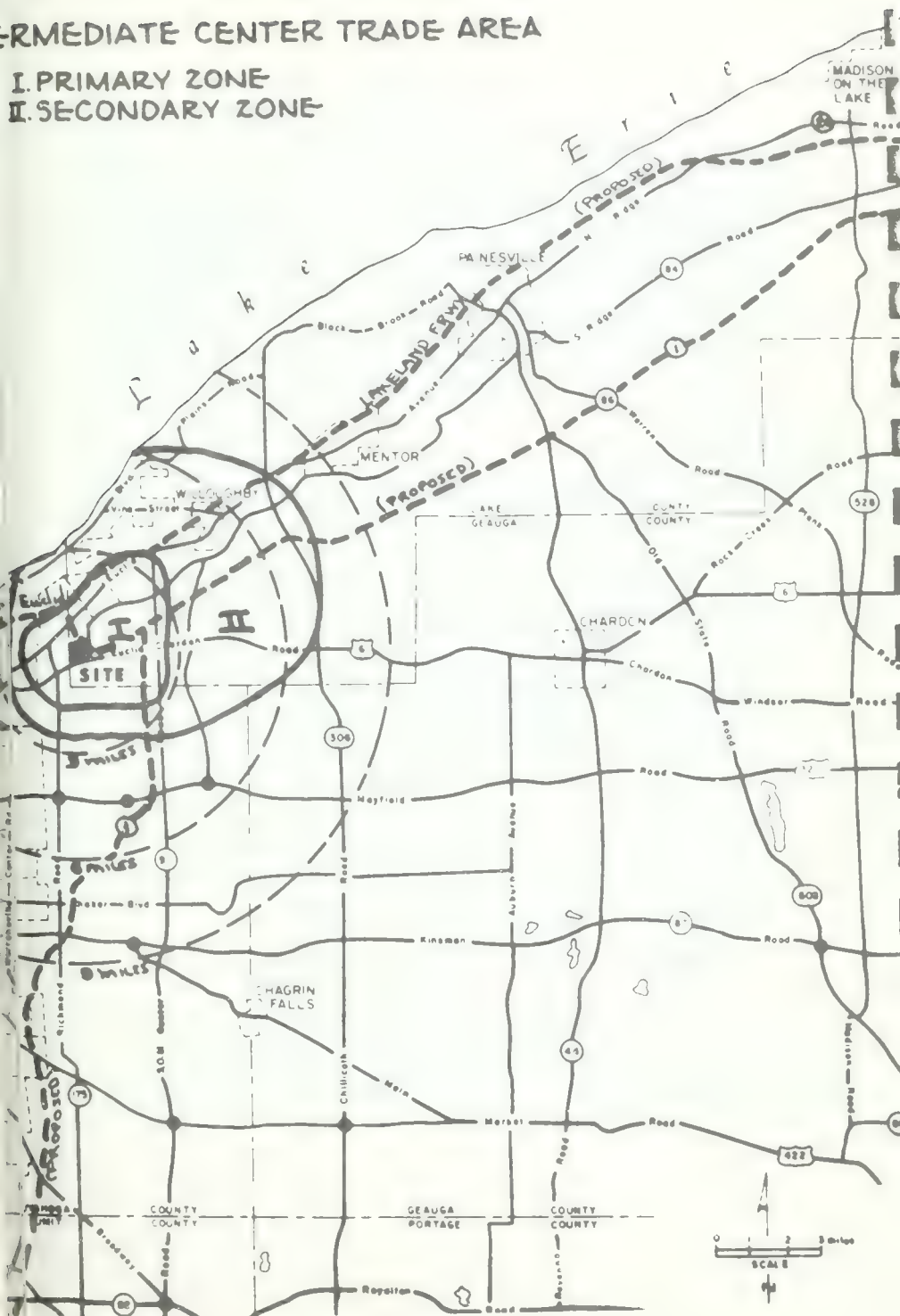
It may be concluded from the above that the present market could support only about 50,000 to 60,000 square feet of department store space by 1965, increasing to approximately 70,000 square feet by 1970. The foregoing is based on the assumption that a department store located at the Nutwood Farms site is capable of obtaining a ten per cent share of all department store expenditures made by trade area residents outside the Cleveland central business district.

It has been our opinion throughout this discussion of a regional shopping center that in the face of the strong competition of existing or announced future department store facilities in the Eastern Cleveland suburbs, a warranted department store area of at least 125,000 to 150,000 square feet would be required to attract adequate patronage for the over-all successful operation of a regional shopping center at the Nutwood Farms site.

Thus, as in the case of the residual method employed initially in this analysis, our findings on the basis of a share-of-the-market approach are also negative.

# INTERMEDIATE CENTER TRADE AREA

- I. PRIMARY ZONE
- II. SECONDARY ZONE





SECTION II  
ANALYSIS FOR AN INTERMEDIATE SHOPPING CENTER

The following is an analysis of the opportunities existing at the subject site for a junior department store in the development of an intermediate-size shopping center. An analysis of this type has been undertaken assuming no major tenant is available for the larger regional center. This discussion is based primarily on information derived in previous sections of this report, and the data has been adjusted where necessary to conform with the analytical technique employed in a study of this type of shopping center development. In the analysis it is assumed that such a center would contain at least one strong junior department store as the major tenant, and that the remainder of the project would be merchandised with other comparison and convenience outlets.

Trade Area

The trade area which would be tributary to the major tenant of an intermediate shopping center is shown on the map opposite this page. It may be seen that the primary zone of the trade area is somewhat smaller than that shown for a regional shopping center. This zone of the trade area extends approximately three miles outboard from the site and is limited by distance and driving time. The secondary zone extends approximately seven and one-half miles outboard from the site. The principal difference concerning the market influence which it is thought would be exercised by the intermediate shopping center, as compared to a regional shopping center, is that the intermediate shopping center would not influence the inboard section of the trade area to nearly the degree that a regional shopping center would; of course, the outboard limitations of the intermediate shopping center are much more restrictive than those for the larger regional center.

Population

Because of the different delineation of the trade area from that previously shown, total population would therefore vary to a considerably extent by zone. The following table indicates estimated future population for selected years for the two zones of the trade area for an intermediate shopping center through 1970:

<u>Trade Area Population</u>			
<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	17,800	20,400	26,000
Secondary	83,100	94,500	113,600
<u>Total</u>	<u>100,900</u>	<u>114,900</u>	<u>139,600</u>

### Income and Expenditures

Per capita incomes for the two zones of the trade area have been determined, based on information derived from the 1950 Census of Population. The figures have been adjusted for the under-reporting inherent in the data and for the rise in income since 1950. Per capita incomes for the primary zone of the trade area for an intermediate shopping center at the Nutwood Farms site are approximately \$2,795, while per capita incomes in the secondary zone of this trade area are slightly lower, or \$2,775.

Based on the income data and on the 1954 Census of Business, a per capita department store expenditure has been estimated for each zone of the trade area.

### Total Trade Area Sales Potential

Total department and apparel store sales potential available to a junior department store and apparel store facilities situated at the proposed shopping center is the product of the per capita department store expenditure developed above and the trade area population. The table following summarizes the department store sales potential for the two zones of the trade area for three relevant years:

Trade Area Total Department Store Sales Potential  
(000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 2,848	\$ 3,264	\$ 4,160
Secondary	\$12,880	\$14,648	\$17,608
<u>Total</u>	<u>\$15,728</u>	<u>\$17,912</u>	<u>\$21,768</u>

Trade Area Total Apparel Store Sales Potential  
(000's)

<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 1,335	\$ 1,530	\$ 1,950
Secondary	\$ 6,232	\$ 7,088	\$ 8,520
<u>Total</u>	<u>\$ 7,567</u>	<u>\$ 8,618</u>	<u>\$10,470</u>

Since the department and apparel store sales potential is the whole amount spent by trade area residents in department and apparel store facilities, a certain portion of this amount is going and will continue to go to department and apparel stores in downtown Cleveland. A suburban share indicating the

amount of these expenditures which could reasonably be retained by suburban facilities has been estimated for each zone of the trade area and is shown in the table below:

<u>Trade Area Department Store Suburban Share</u> (000's)				
<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>	<u>Suburban Share</u>
Primary	\$ 1,851	\$ 2,122	\$ 2,704	65%
Secondary	8,372	9,821	11,445	65%
<u>Total</u>	<u>\$10,223</u>	<u>\$11,643</u>	<u>\$14,149</u>	

<u>Trade Area Apparel Store Suburban Share</u> (000's)				
<u>Zone</u>	<u>1962</u>	<u>1965</u>	<u>1970</u>	<u>Suburban Share</u>
Primary	\$ 934	\$ 1,071	\$ 1,365	70%
Secondary	4,362	4,962	5,964	70%
<u>Total</u>	<u>\$ 5,296</u>	<u>\$ 6,033</u>	<u>\$ 7,329</u>	

Of the total suburban department and apparel store potential generated by residents in the two zones of the trade area, it is estimated that existing department and apparel stores are effectively competitive to the degree indicated below:

<u>Trade Area Unsatisfied Department Store Potential</u> (000's)				
<u>Zone</u>	<u>Effective Competition</u>	<u>Unsatisfied Potential</u>		
		<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 6,685	--	--	--
Secondary	16,571	--	--	--
<u>Total</u>	<u>23,256</u>	--	--	--

<u>Trade Area Unsatisfied Apparel Store Potential</u> (000's)				
<u>Zone</u>	<u>Effective Competition</u>	<u>Unsatisfied Potential</u>		
		<u>1962</u>	<u>1965</u>	<u>1970</u>
Primary	\$ 3,511	--	--	--
Secondary	4,678	--	\$ 284	\$1,286
<u>Total</u>	<u>\$ 8,189</u>	--	<u>\$ 284</u>	<u>\$1,286</u>

Based on the figures developed above, it would appear that opportunities for the development of an intermediate shopping center with a junior department store as the major tenant, are negative at present. There are some possibilities, however, that population may increase more rapidly than appears likely at the present time. Should unexpectedly rapid expansion occur, it might be necessary to review again the results of the foregoing analysis.

The fact that a larger intermediate center is not felt to be warranted at present does not, however, preclude the use of at least a portion of the property for another type of retail development.

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APPENDIX

DEFINITIONS OF TERMS

To further facilitate review and appraisal of this analysis, definitions of some of the phrases and words used which have special significance are set forth below.

Regional Shopping Center - A regional shopping center is generally designed to serve a trade area population of from 150,000 to 400,000 people. The size of this type of center may range from 350,000 square feet to over 1,000,000 square feet. Department stores are the dominant tenants, and normally occupy about one-third to one-half of the total area. The function of such a center is to create complete comparison shopping facilities with a strong attraction for customers living as much as 10 to 15 miles from the site, depending, of course, upon existing competitive facilities, access routes, etc. The area of strongest influence for such a center normally extends from three to six miles from the development.

Dominant Tenant - The dominant tenant -- the department store -- or stores in some cases, is the primary traffic generator which attracts customers to the shopping center. While it is possible for a center to operate without such a tenant, it would be unlikely that leases for all of the essential non-department store space could be obtained in the absence of a major tenant. The realization of a maximum return on the investment requires the presence of this major tenant, and as a result, it is essential that the trade area of the proposed shopping center be capable of supporting the dominant tenant or tenants.

Trade Area - The area of influence from which a shopping center could expect to derive as much as 85% of its total sales volume is defined here as the trade area of the center. This area is delimited by various factors which include driving time; topography; natural and man-made barriers such as coast lines, rivers, swamps, highways and railroad tracks; and the existence of strong competitive facilities.

It should be noted here that the 85% of total sales volume which the shopping center can expect from its trade area is not the suburban share (see definition following) but rather a statistical value used to indicate that some portion of the sales volumes obtained in a suburban shopping center comes from beyond the logical and normal trade area borders. This business nor-



mally consists of transient trade, an occasional shopping trip from a distant city and other like shopping. Throughout this report statistical value has not been given to this trade (up to 15% of total sales volume) but it has been recognized and, as a result, this unevaluated sales volume may be considered as a plus factor which will add to the security of the investment.

Suburban Share - The suburban share of total retail expenditures refers to that portion of those expenditures which would be made in suburban, i.e., non-downtown stores, providing adequate suburban shopping facilities are available. The determination of suburban share depends upon the distance of the area from a major downtown shopping district, the presence of other suburban stores within the area, existing shopping habits, store preference, etc. The suburban share varies greatly depending upon the influence of the above factors. For example, the suburban share of department store-type merchandise expenditures in Manhattan would be nearly 0%, while in suburban Nassau and Suffolk Counties, distance, as well as the existence of suburban retail developments, have combined to result in a suburban share of 80% to 85% for department store-type merchandise.

Total Sales Capacity - Capacity as used throughout this report refers to the estimated amount of sales volume that existing retail facilities are capable of obtaining and holding under normal competitive conditions when adequate facilities with competent management are available to customers. In no way does the use of the term connote maximum physical capacity of a given plant to attain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities when customers are free to choose from a wide variety of stores.

Effectiveness - Effectiveness refers to that portion of the total sales capacity of a competitive unit or group of stores which the unit or group obtains from within the subject trade area. This term refers to the estimated effect which existing competitive facilities will have in the subject trade area after the proposed shopping center is constructed.

Inboard and Outboard Sides - These terms are used to refer to portions of a trade area which lie between the site and the central business district (inboard side) or beyond the site away from this major competitive area (outboard side). Normally, existing shopping habits, other major competitive facilities and the general orientation of population in the inboard side makes a given suburban center less effective per capita in this zone than in the outboard area. This does not mean, however, that a larger portion of the center's sales volume will necessarily originate in the outboard area. Often population is more heavily concentrated on the inboard side, and although the center is less effective per capita in this area, it is still of considerable importance and will draw a large portion of its volume from this part of the trade area.







## V. HISTORY OF ATTEMPTS BY HILLTOP TO INTEREST TENANTS, DEVELOPERS AND INVESTORS IN NUTWOOD

On the following pages appears a resume in chart form of the attempts by Hilltop, both on behalf of Mesdames Ashcraft and Powell, and of Ridge Hills, Inc. to interest potential tenants, developers or investors in the potential of Nutwood for development as a shopping center, discount center, or for motel or restaurant purposes. The results were uniformly negative.

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Higbee Co.	Department Store	August 1, 1958	Conference	A.F., R. 1139-40
Sears, Roebuck	Department Store	August 4, 1958	Conference	A.F., R. 1141
Dominic Visconsi	Developer	August 8, 1958	Conference	A.F., R. 1141
Higbee Co.	Department Store	August 26, 1958	Phone call	EX. 371, P. 47
Higbee Co.	Department Store	September 12, 1958	Visit to Site	EX. 371, P. 47
William Taylor & Son	Department Store	November 22, 1958	Letter Enclosing Aerial Photo & Isochron Chart	A.F., R. 1144-46
Fred Stark	Developer	Before Dec. 18, 1958	Conference	EX. 371, P. 65
Halle Bros.	Department Store	Before Dec. 31, 1958	Letter, Promotional Materials	TR. 348
Dominic Visconsi	Developer	January 18, 1959	Conference	EX. 371, P. 73
Fred Stark,	Developers	January 18, 1959	Conference	EX. 371, P. 73
Leonard Fuchs	Builder & Developer	During Jan., 1959	Conference	EX. 371, P. 72-74
William Rupple	Investment Broker	During Jan., 1959	Conference	EX. 371, P. 72-74
Edward Mellen				



Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Higbee Co.	Department Store	During Jan., 1959	Indirect Contact Through Mr. Mellen	A.F., R. 1150
William Taylor & Son Sears, Roebuck Edward Mellen, et al. Allied Stores (Sterling-Junder-Davis)	Department Store Department Store Investment Brokers Department Store	During Jan., 1959 March 7, 1959 July 10, 1959 July 15-30, 1959	Phone Call Letter Conference Letter, Conferences	EN. 371, P. 73 A.F., R. 1155-57 A.F., R. 1184 A.F., R. 1184
Harry Partner Albert Kattner Edward DeBartolo The May Co.	Developer Developer Developer Department Store	July 22, 1959 July 29, 1959 Oct.-Dec., 1959 1958 or 1959	Visit to Site Conference Conference Conferences	TR. 351-52 A.F., R. 1184 A.F., R. 1184 TR. 353-61
Unidentified Edward DeBartolo The May Co.	"Land Users" Developer Department Store	January 18-20, 1960 January 28, 1960 June 29, 1960	Letter Promotional Brochure, Conference	EN. 371, P. 162 A.F., R. 1224-25 A.F., R. 1245; TR. 421-25
Newberry Co. Allied Stores W. T. Grant Woolworth J. C. Penney Co. Higbee Co. Shearson Hotels Hotel Corporation of America Hilton Hotels	Variety Store Department Store Department Store Variety Store Department Store Department Store Hotels Hotels Hotels	September 30, 1960 September 30, 1960 September 30, 1960 September 30, 1960 September 30, 1960 Before Oct. 25, 1960 November 4, 1960 November 4, 1960 November 4, 1960	Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure Promotional Brochure	A.F., R. 1250 A.F., R. 1250 A.F., R. 1250 A.F., R. 1250 A.F., R. 1250 A.F., R. 1251 A.F., R. 1252 A.F., R. 1252 A.F., R. 1252
	Hotels	November 4, 1960	Promotional Brochure	A.F., R. 1252

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Howard Johnson Holiday Inns	Restaurants Motels	November 4, 1960	Promotional Brochure	A.F., R. 1252
Stouffer Co.	Restaurants	November 4, 1960	Promotional Brochure	A.F., R. 1252
The Kroger Co.	Grocery Stores	November 18, 1960	Promotional Brochure	A.F., R. 1252
Montgomery Ward	Department Stores	May 18, 1961	Promotional Brochure	A.F., R. 1257
Interstate Dept. Stores	Department Stores	June 1, 1961	Promotional Brochure	A.F., R. 1257
The May Company	Department Stores	June 14, 1961	Promotional Brochure	A.F., R. 1257
Homart Corp.	Division of Sears, Roebuck	July 18, 1961	Promotional Brochure	A.F., R. 1258
J. M. Fields	Discount Store	August 3, 1961	Promotional Brochure	A.F., R. 1258
Mason's Discount Centers	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Shopper's Fair Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
E. J. Korvette, Inc.	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Clark's Discount Department Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
King's Dept. Stores	Discount Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
R. H. Macy & Co.	Department Stores	August 3, 1961	Promotional Brochure	A.F., R. 1258
Creamery Package Mfg. Co.	Ice Skating Rinks	September 21, 1961	Schematic Land Use Plan	A.F., R. 1260
Sears, Roebuck	Department Store	September 30, 1961	Promotional Brochure	A.F., R. 1260
Peter Kavanos	Investor	November 16, 1961	Promotional Brochure	A.F., R. 1261
R. H. Macy & Co.	Department Stores	August 3, 1961	Promotional Brochure	A.F., R. 1262
Joseph Stendig	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Fordham Co.	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262

Person Contacted	Nature of Business of Person Contacted	Date of Contact	Nature of Contact	Reference
Crossway Motor Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Interhost	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Manger Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Kanada Inn Roadside Hotels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Imperial "400" Motels	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Travelodge Corp.	Motels	1961 or 1962	Promotional Brochure	A.F., R. 1262
Twenty-Five Investors or Developers		1961 or 1962	Promotional Brochure	A.F., R. 1262-63

## VI. EXHIBITS

On the following pages are listed the Exhibits which were identified at trial, together with a record of the action taken thereon. Several explanatory notes are in order, to-wit:

1) Exhibits were, by agreement of counsel, numbered sequentially during depositions. Some were not identified at trial, hence there are gaps in the number sequence in the following table.

2) Because of the foregoing agreement as to numbering, exhibits do not bear a "plaintiffs'" or "defendants'" designation.

3) In the table, "R" refers to the record of papers filed, "TR" to the reporter's transcript. The "R" citations under the "Identified" column refer to the pre-trial order.

4) The column, "Offered Post-Trial," refers to exhibits which were, pursuant to direction of the court, referred to in post-trial briefs, although not admitted at trial. The page numbers in this column refer to a stipulation and order making such exhibits part of the trial record. There was no further action by the court on these exhibits, hence they are not shown as admitted or rejected.

5) The index to the reporter's transcript does not record the offering of exhibits, as distinct from their identification, admission and rejection, hence it was not feasible to include a column entitled "Offered."

6) At TR 2118, and in the reporter's index to transcript, Exhibit 344 is incorrectly referred to as "ex. 334-E." There is no "ex. 334-E," and from the context it is clear that ex. 344 was the subject of the court's action on TR 2118, hence on the following table ex. 344 is shown as admitted at TR 2118.

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
1	R 1385				
2	R 1385				
3	R 1385				
5	R 1385				
6	R 1385				
7	R 1392	TR 2527			
9	R 1385				
10	R 1385	TR 446			
11	R 1385	TR 447			
12	R 1385				R 2191
13	R 1385			TR 770	
15	R 1385				
16	R 1385	TR 2528			
19	R 1385	TR 655			
20	R 1385				R 2191
21	R 1385	TR 169			
24	R 1385			TR 811	
25	R 1385	TR 700			R 2191
27	R 1385	TR 455			
28	R 1385	TR 457			
29	R 1385	TR 447			
31	R 1385	TR 169			
32	R 1385	TR 169			
33	R 1385				
34	R 1385	TR 2527			
35	R 1385	TR 461	TR 172		
36	R 1385	TR 462			
37	R 1385				
38	R 1388			TR 740	
39	R 1388				
40	R 1388				
41	R 1388	TR 700			
42	R 1388				
43	R 1388	TR 445			
44	R 1386				
45	R 1386				
46	R 1386	TR 2321			
47	R 1386	TR 2321			
48	R 1386	TR 2321			
49	R 1386				
50	R 1386				
51	R 1386				
52	R 1386				
53	R 1386				
54	R 1386	TR 682			
55	R 1386	TR 771		TR 773	
56	R 1386				
58	R 1386				
58 A		TR 2112			



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60	R 1386				
61	R 1386				R 2191
63	R 1386				R 2191
64	R 1386				
65	R 1386				
66	R 1386				
67	R 1386				
68	R 1386				
69	R 1386				
72	R 1386				R 2191
73	R 1386				
74	R 1386				
75	R 1386				
76	R 1386				
77	R 1386	TR 2530			R 2191
78	R 1386	TR 2527			
79	R 1386				R 2191
80	R 1386				
81	R 1386				R 2191
82	R 1386	TR 651			
83	R 1386				
84	R 1386				R 2191
86	R 1392				
88	R 1386				
91	R 1386				
92	R 1386				
93	R 1386	TR 448			
94	R 1386	TR 1232			
95	R 1386				
96	R 1392				
97	R 1386	TR 2542			R 2191
98	R 1386				
99	R 1386				
99 A	R 1386				
99 B	R 1386				
104	R 1386				R 2191
105	R 1386	TR 2189			
106	R 1386	TR 2542			
107	R 1392				
109	R 1386	TR 2543	TR 2519		R 2191
110	R 1386	TR 2542			
111	R 1386	TR 2542			
112	R 1386				R 2191
117	R 1386	TR 866			R 2191
118	R 1386	TR 1682		TR 1684	R 2191
		TR 2534			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
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125	R 1386				
130	R 1386				
130-1		TR 978			
133	R 1386				
142	R 1386				R 2192
143	R 1386	TR 597			
147	R 1386	TR 964			
148	R 1386	TR 953			
149	R 1386	TR 959			
150	R 1386	TR 962			
152	R 1386				
153	R 1386				
154	R 1386				R 2192
155	R 1386				R 2192
156	R 1386				
157	R 1386				
158	R 1386				R 2192
159	R 1386				
160	R 1386				
161	R 1386				
162	R 1386				
163	R 1386				
164	R 1386	TR 2534			
166	R 1386				
166 A	R 1386	TR 2535	TR 141		
168	R 1386				R 2192
169	R 1386				
170	R 1386				
171	R 1386				
172	R 1386	TR 2565			
173	R 1387				
174	R 1387				
175	R 1387	TR 447			
176	R 1387	TR 447			
177	R 1387	TR 448			
178	R 1387				
179	R 1387	TR 599			
181	R 1387	TR 779			
182	R 1387	TR 782			
185	R 1387				
186	R 1387	TR 788			
187	R 1392				
188	R 1387				
189	R 1392				
190	R 1392				
191	R 1387	TR 655			
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192	R 1387	TR 2542			

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193	R 1387	TR 1005			
194	R 1387	TR 2538			
195	R 1387				
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195 A		TR 112			
195 B		TR 111			
196	R 1392				
197	R 1387				
197 A	TR 149	TR 149			
197 B	TR 284	TR 284			
197 C	TR 285	TR 285			
197 D					R 2192
198	R 1387				
198 A		TR 108			
198 B		TR 110			
198 C	TR 134				
198 D	TR 1638	TR 1640			
199	R 1387				
199 C		TR 2318			
200	R 1387				
200-3		TR 1702			
201	R 1387				
201-1		TR 2517			
201-2		TR 2517			
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201-7		TR 2517			
201-8		TR 2517			
201-9	TR 311	TR 1465	TR 314		
202	R 1387				
202-1		TR 2539			
202-2		TR 2539			
203	R 1392				
204	R 1387				R 2192
205 A	R 1387	TR 1425			
205 B	R 1387				
206 A	R 1387				
206 B	R 1387				
206 C	R 1392				
206 D	R 1392				
207	R 1392				
208 B	R 1392				R 2192
209 A	R 1387	TR 662			R 2192
		TR 1940			
209 B	R 1387	TR 1940			

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209 C	R 1387	TR 1940			
210	R 1387	TR 718			
210 A	R 1387				
211 A	R 1392	TR 2540			
212 A	R 1392	TR 2540			
213	R 1387				
214	R 1392				
217					R 2192
218	R 1387				
219	R 1387				
220	R 1387				
223	R 1392				
224	R 1387				
225	R 1387	TR 2518			
	R 1392				
231	R 1387				
232	R 1387		TR 2391		
			TR 2541		
233	R 1392				
234	R 1392	TR 2541			
235	R 1392				
236	R 1387	TR 449			R 2192
237	R 1387				
238	R 1387				
239	R 1392	TR 449			
245	R 1392		TR 2555		
246	R 1387			TR 2543	
247 A	R 1392				
248	R 1392				
248 L		TR 1656			
249	R 1387				
250	R 1387				
251	R 1387				
252	R 1392	TR 2549			
253	R 1387	TR 1891			
254	R 1387	TR 747			
255	R 1387				
257	R 1387				
258	R 1387		TR 494		
260	R 1387				R 2192
261	R 1387				
264	R 1387				
265	R 1387				
266	R 1387				
267	R 1387			TR 2545	
268	R 1392				
269	R 1392				
270	R 1392				
271	R 1392	TR 2545			

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
272	R 1392	TR 2545			
273	R 1392				
274	R 1387				R 2192
275	R 1387				
276	R 1387	TR 2546			
277	R 1387				
278	R 1392				
279	R 1387				
280	R 1387				
282	R 1387				
291	R 1387				
292	R 1387				
293	R 1387				
296	R 1387				
298	R 1387				
299	R 1387				
300	R 1387				
301	R 1387				
302	R 1387				
311	R 1387				
312	R 1387				R 2192
313					R 2192
314					R 2192
315	R 1387	TR 126			
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318	R 1388				
319	R 1388				
320	R 1388				
322	R 1388	TR 120			
323	R 1388	TR 2553			
324	R 1388				
325	R 1388				
326	R 1388				
327	R 1388				
328	R 1388	TR 2547			
329	R 1388				
330	R 1388	TR 451			
331	R 1388	TR 451			
332	R 1388	TR 452			
333	R 1388	TR 453			
334	R 1388	TR 453			
334 A		TR 2548			
335	R 1388				
335 A		TR 455			
335 B		TR 455			
336	R 1388	TR 212			
337	R 1392	TR 2549			
338	R 1392	TR 2549			
339	R 1392				

Exhibit Number	Identified	Admitted	Rejected	Withdrawn	Offered Post-Trial
340	R 1392	TR 2549			
341	R 1392				
342	R 1392	TR 1714			
343	R 1392	TR 1927			
344	R 1392	TR 2118			
344 A		TR 2119			
344 B		TR 2120			
344 C		TR 2121			
344 D		TR 2121			
344 E		TR 450			
344 F		TR 2122			
345	R 1392	TR 1928			
346	R 1392	TR 1929			
347	R 1392			TR 2212	
348	R 1392				
348 A	TR 398	TR 398			
348 B	TR 401	TR 404			
349	R 1392				
350	R 1392				
351	R 1389			TR 2550	
352	R 1389				
353	R 1389				
354	R 1389	TR 1471			
355	R 1389				
356	R 1389				
357	R 1389				
358	R 1389				
359	R 1389				
361	R 1389				
362	R 1389				
363					R 2192
364	TR 207				
365	TR 1239	TR 2553			
366	TR 2208	TR 2268			
367	TR 2208	TR 2268			
368	TR 2440	TR 2440			
369	TR 2467	TR 2467			
370	TR 2493	TR 2493			
371		TR 2550			



**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 21,027

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOM JOHNSON, INC., RESPONDENT

---

On Petition for Enforcement of an Order of the  
National Labor Relations Board

---

BRIEF FOR TOM JOHNSON, INC.

---

PETER I. BREEN

*Attorney for Respondent*

*Tom Johnson, Inc.*

FEB 14 1967

FILED

FEB 18 1967

WM. B. LUCK, CLERK



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*v.*

TOM JOHNSON, INC., RESPONDENT

---

**On Petition for Enforcement of an Order of the  
National Labor Relations Board**

---

BRIEF FOR TOM JOHNSON, INC.

---

ARGUMENT

- I. Substantial Evidence on the Record as a Whole Fails to Support the Board's Finding that Respondent Violated Section 8(a)(3) and (1) of the Act by Discharging Utra and Hoskins Because They Sought Union Support of the Grievances.

The Trial Examiner in his concluded Findings (R. 21)<sup>1</sup> stated his conclusion of the weight and credibility of the evidence as follows:

---

<sup>1</sup> References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume 1, pleadings" are designated "R." References to portions of the stenographic

"The testimony of the witnesses upon the issue of the Company's failure to bargain with the Union presents a sharp conflict. Hence, some comment on the demeanor and bearing of the witnesses is warranted. The Trial Examiner is not inclined to accept Johnson's testimony on this point, because portions of his testimony, such as Utra's and Silva's alleged request, that Johnson 'save' their subsistence pay for them, so they would not gamble it away, sounds implausible. Furthermore, the discrepancies between what Johnson charged the Wagon Wheel and paid to the employees, do not recommend the reliability of Johnson. Johnson appears to have been guilty of either sharp dealing or unforgivable laxity in these matters. Either militates against the ready acceptance of his testimony.

"On the other hand, employees Utra and Hoskins both testified volubly, but with the truculence of disgruntled employees. *Their display of vindictiveness toward Johnson, called clearly for a close scrutiny of their testimony.* Silva's testimony had the same taint, but to a lesser degree. The antipathy of these witnesses to Johnson may have been born of a righteous indignation but their attitude did not seem to indicate that feeling. The Trial Examiner deems the testimony of Johnson and the three named employees, the principals, as unacceptable. *However, the two foremen testified in a forthright manner and Denzer and Davis of the employees testified with every indication of*

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transcript reproduced pursuant to rules 10 and 17 of this Court are designated "Tr." "GC Exh." refers to exhibits of the General Counsel; "R. Exh." refers to respondent's exhibits.



*accuracy and fairness."*

The testimony of Utra and Hoskins was discredited and the Trial Examiner found that they had been fired for cause (R. 22). In determining whether or not the findings of the Board was based upon substantial evidence in the record as a whole, the Trial Examiner looked to the testimony of Schultz and Cleveland, two foremen, and the testimony of Denzer and Davis, because not only was Utra and Hoskins' testimony disregarded, but the employer, Mr. Duane Johnson's testimony was also disregarded. The record discloses that Johnson continually discussed the controversy with respect to overtime pay and subsistence with the Business Agent from the Union. The Trial Examiner agreed that Schultz was present at a meeting on December 13, 1962 between Crumley and Johnson; and that Crumley explained that the company would have to pay wages according to the contract terms (R. 20). The testimony of Schultz was to the effect that in December, 1962 there were general discussions among employees and among management representatives regarding overtime pay and that on December 13 Crumley, the business agent for the Union, traveled to the job site and told Johnson he would have to pay wages according to the bargaining agreement terms (TR. p. 215).

Looking at the discharge of Utra and Hoskins, the petitioner's Brief clearly sets forth the general rule announced by this Court that matters of credibility are generally for the trier of fact. *N.L.R.B. v. I.L.W.U. Local 10, et al*, 283 F. 2nd 558, 562.

It has also been noted that where Trial Examiner and the Board disagree in their conclusions, the evidence

must be examined with greater care than where both Board and Trial Examiner are in agreement. *United Fire Works Mfg. Co. v. N.L.R.B.*, 252 F. 2nd, 428.

While the Board refused to agree with the Trial Examiner that the testimony of Schultz and Cleveland deserved to be credited (R. 39), there is apparently no disagreement by the Board on the finding of the Trial Examiner that the testimony of Utra and Hoskins regarding their discharge was not worthy of being credited.

Therefore, the statement of law as set forth in p. 21 of Petitioner's Brief in which Petitioner cited *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659, to the effect that the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next, would seem to apply to Utra and Hoskins as well as Petitioner applied the principle to the two foremen, Schultz and Cleveland.

In determining that Respondent violated Section 8(a) (1) and (5) of the Act by bargaining directly with its employees, the Trial Examiner relied on many factors, including the testimony of Silva and Denzer, discrepancies in the payroll record and the "implausible testimony of Johnson" (R. 21). However, with respect to the question of the discharge of Utra and Hoskins, the Trial Examiner appears to have made that determination based upon the demeanor and bearing of Utra, Hoskins, Schultz and Cleveland as they were testifying. Therefore, it would seem that the determination by the Trial Examiner as to the credibility of these four witnesses should be accorded the weight given them by the Trial Examiner.

Granting for the sake of argument that the testimony

of Johnson was contradictory to that of Schultz and Cleveland with respect to the discharge of Utra and Hoskins. it must be remembered that Johnson's testimony regarding the discharge was not accepted by the Trial Examiner. The real contradiction giving rise to the reason for discharge considered by the Trial Examiner was that between the two foremen, and Utra and Hoskins. The Trial Examiner noted, (R. 20, 21) that Utra's trade was that of a painter. That after this work was completed he was tried at various inside jobs, including paper hanging and stripping, in addition to enameling work. Utra himself admitted doing this work but gave flimsy excuses for its being done in an unsatisfactory manner. Thus, petitioner's statement on p. 21 of his Brief stating that Schultz's testimony was suspect because the enameling work had been completed two weeks before he was laid off, is without merit. Moreover, petitioner's statement that the company's records support the conclusion that Schultz's explanation for Hoskins' discharge was without foundation in fact, is similarly without merit. We only have Hoskins' statement that at the time of his layoff Schultz informed him that the company was laying off everyone who was drawing subsistence and this the Trial Examiner disregarded. It is submitted, therefore, that analysis of the record as a whole has not disclosed any significant deficiencies in the Trial Examiner's credibility resolutions. It is rare that a record contains evidence for one side or the other, which is perfectly uniform. Certain discrepancies always exist and it is submitted that those set forth by petitioner have no significance. It is respectfully submitted, therefore, that there is no substantial evidence on the record as a whole to support the Board's reversal of the Trial Examiner

with respect to the discharge of Utra and Hoskins.

- II. Substantial Evidence on the Record as a Whole Fails to Support the Board's Finding That Respondent Violated Section 8 (a)(1) and (5) of the Act by Bargaining Directly With Certain of Its Employees by Unilaterally Changing Its Employees' Conditions of Employment Without Consulting the Union at a Time When the Union Was the Authorized Representative of Its Employees and by Threatening Its Employees With Loss of Overtime Employment. If Anything, the Acts Complainned of Constituted a Breach of Contract and the Remedy Would Be to Bring an Action for a Breach of Contract.

If the record shows wrongdoing on the part of Johnson, it shows only that there was a breach of the collective bargaining contract, (GC 3), and that such breach would not constitute unfair labor practice. This being the case, the Courts would be the forum for redress and not the Board. The Trial Examiner found that the discharge of Utra and Hoskins was not unlawfully motivated and Respondent has previously submitted its reasons to show that there was no substantial evidence in the record as a whole to reverse that finding.

In the Case of *Independent Petroleum W. of N.J. v. Esso Stand. Oil Co.*, 235 F. 2nd 401, the Court pointed out that a breach of contract was not an unfair labor practice, where pp. 403 and 404, the Court said:

"We are of the opinion that the view of the plaintiff is the correct one and that the District Court erred in dismissing Count 1 of the plaintiff's Complaint.

"In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 1955, 348 U.S. 437, 75 S. Ct. 489, 99 L. Ed. 510, the Supreme Court specifi-

cally noted that Section 301 of the Taft-Hartley Act confers jurisdiction on federal courts in cases involving breach of collective bargaining contracts. In Note 2, at page 443, of 348 U.S. at page 492 of 75 S. Ct. it said:

‘It is significant, however, that breach of contract is not an unfair labor practice.’ A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: ‘Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.’ H. R. Conf. Rep. No. 510, 80th Cong., 1 Sess. 42.’

“That such jurisdiction belongs exclusively to the courts was held by the National Labor Relations Board in *United Telephone Company of the West*, 112 NLRB 779 (1955).

“Said the Board, page 782: ‘The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.’

“The Board, citing prior rulings, stated (page 781): ‘As the Board has held for many years, with the approval of the courts: ‘ \* \* \* it will not effectuate the statutory policy \* \* \* for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.’

“It is pertinent to note that in *United Telephone Company of the West*, *supra*, the union and employer gave conflicting interpretations to overtime provisions in their collective bargaining contract and when they were unable to agree the employer filed a suit for declaratory



judgment. The Union thereupon filed a complaint with the Board charging unfair labor practices. The Trial Examiner in his Intermediate Report found against the employer. The latter filed exceptions to the Report contending that it had a right to submit the dispute as to the correct interpretation of their contract to the courts rather than to the Board. The Board agreed, stating (page 780): 'Inasmuch as the issue of the construction of the contract is now pending before a court of apparent jurisdiction no valid reason exists for the Board to enter this controversy.'

In *Drake Bakeries v. Local 50*, 370 U.S. 254, 8 L. Ed. 2d 474, 82 S. Ct. 1346, it was pointed out at page 480 of 8 L. Ed. 2d as follows:

'In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S. Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 1L. Ed. 2d 972, 980, 77 S. Ct. 912). The preferred method for settling disputes was declared by Congress to be '(f)inal adjustment by a method agreed upon by the parties ( § 203 (d) of the Act, 29 USC § 173 (d). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers of America v. American Mfg. Co.* 363 U.S. 564, 466, 4 L. Ed. 2d 1403, 1405, 80 S. Ct. 1363). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this. We could



enforce only the no-strike clause by refusing a stay in the suit for damages in the District Court. We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is arbitrated. This we prefer to do.”

and further on page 482 of 8 L. Ed. 2d:

“A strike in violation of contract is not *per se* an unfair labor practice and there is no suggestion in this record that the one-day strike involved here was of that nature. We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union.”

In *Cheney California Lumber Company v. N.L.R.B.*, 319 Fed. (2) 375, at p. 378 (1963) Judge Merrill of the Court of Appeals, 9th Circuit, said:

“While such a strike does constitute a breach of contract and is an unprotected labor activity, it does not follow that it constitutes an unfair labor practice. As pointed out in *International Union, United Mine Workers v. NLRB* (1958) 103 U.S. App. D. C. 207, 257 F. 2d 211, 214-215, legislative history of the Taft-Hartley Act shows that it was not intended that violation of a collective bargaining agreement should, *per se*, be held to be an unfair labor practice. Congress rejected such an unfair labor practice proposal. H. R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947); 1 Legislative History of the Labor Management Relations Act 114, 545-546. Section

301, 29 U.S.C. section 185, indicates that the federal and state courts, not the Board are the proper forum for parties seeking to remedy alleged violations of collective bargaining agreements. United Mine Workers, *supra*, 257 F. 2d at page 215 points out that: 'The Board has heretofore taken the position that it, the Board, 'is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of its terms.'

"Cf. Feinsinger, The National Labor Relations Act and Collective Bargaining, 57 Mich. L. Rev. 807 (1959).

"In NLRB v. Insurance Agents' International Union (1960) 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed. 2d 454, it was held that a resort to unprotected labor activity, in the form of union slowdowns, does not *per se* constitute a refusal to bargain in good faith. The court states, 361 U.S. at pages 495, 496, 80 S. Ct. at page 430:

\* \* \* (T)he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. \* \* \* It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it.'

"In our judgment the fact that a strike, otherwise wholly consistent with good-faith collective bargaining, constitutes a violation of a no-strike agreement does not, *per se*, render the strike a refusal to bargain in good faith. Cheney has its remedy for damages resulting from

this contract violation. Whether the conduct of the Union in calling the strike constitutes a refusal to bargain in good faith must be determined not on a *per se* basis but upon a scrutiny of the circumstances taken in their entirety. This matter we shall consider later in this opinion.”

In *Smith v. Evening News Asso.*, 9 L. Ed. 2d 246, the Supreme Court of the United States said in an opinion delivered by Mr. Justice White for the Court:

“Petitioner is a building maintenance employee of respondent Evening News Association, a newspaper publisher engaged in interstate commerce, and is a member of the Newspaper Guild of Detroit, a labor organization having a collective bargaining contract with respondent. Petitioner, individually and as assignee of 49 other similar employees who were also Guild members, sued respondent for breach of contract in the Circuit Court of Wayne County, Michigan. The complaint stated that in December 1955 and January 1956, other employees of respondent, belonging to another union, were on strike and respondent did not permit petitioner and his assignors to report to their regular shifts, although they were ready, able and available for work. During the same period, however, employees of the editorial, advertising and business departments, not covered by collective bargaining agreements, were permitted to report for work and were paid full wages even though there was no work available. Respondent’s refusal to pay full wages to petitioner and his assignors while paying the nonunion employees, the complaint asserted, violated a clause in the contract providing that ‘there shall be no discrimination against any employee because of his membership or

activity in the Guild.

"The trial court sustained respondent's motion to dismiss for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the Labor Management Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board. The Michigan Supreme Court affirmed, 362 Mich. 350, 106 NW 2d 785, relying upon *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773, and like pre-emption cases. Certiorari was granted, 369 U.S. 827, 7 L. Ed. 2d 793, 82 S. Ct. 843, after the decisions of this Court in *Teamsters, C.W. & H. v. Lucas Flour Co.* 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571, and *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519.

"*Lucas Flour and Dowd Box*, as well as the later *Atkinson v. Sinclair Refining Co.* 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318, were suits upon collective bargaining contracts brought or held to arise under § 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the pre-emption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The auth-

ority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.

“We are left with respondent’s claim that the predicate for escaping the Garmon rule is not present here because this action by an employee to collect wages in the form of damages is not among those ‘suits for violations of contracts between an employer and a labor organization \* \* \* ,’ as provided in § 301. There is support for respondent’s position in decisions of the Courts of Appeals, and in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.* 348 U.S. 437, 99 L. Ed. 510, 75 S. Ct. 488, a majority of the Court in three separate opinions concluded that § 301 did not give the federal courts jurisdiction over a suit brought by a union to enforce employee rights which were variously characterized as ‘peculiar to the individual benefit which is their subject matter,’ ‘uniquely personal’ and arising ‘from separate hiring contracts between the employer and the employee.’ *Id.*, 348 U.S. at 460, 461, 464.

“However, subsequent decisions here have removed the underpinnings of *Westinghouse* and its holding is no longer authoritative as a precedent. Three of the Justices in that case were driven to their conclusion be-



cause in their view 301 was procedural only, not substantive, and therefore grave constitutional questions would be raised if 301 were held to extend to the controversy there involved. However, the same three Justices observed that if, contrary to their belief, 'Congress has itself defined the law or authorized the federal courts to fashion the judicial rules governing this question, it would be self-defeating to limit the scope of the power of the federal courts to less than is necessary to accomplish this congressional aim.' *Id.*, 348 U.S. at 442. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912, of course, has long since settled that 301 has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts. 'There is no constitutional difficulty' and 301 'is not to be given a narrow reading.' *Id.*, 353 U.S. at 456, 457. Section 301 has been applied to suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912, *supra*; *General Electric Co. v. United Electrical, etc.*, 353 U.S. 547, 1 L. Ed. 2d 1028, 77 S. Ct. 921; to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358; to recover wages increases in a contest over the validity of the collective bargaining contract, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519, *supra*; and to suits against individual union members for violation of a no-strike clause contained in a collective bargaining agreement. *Atkin-*



son v. Sinclair Refining Co. 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318, *supra*.

“The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

“The same considerations foreclose respondent’s reading of 301 to exclude all suits brought by employees instead of unions. The word ‘between’, it suggests, refers to ‘suits’, not ‘contracts’ and therefore only suits between unions and employers are within the purview of 301. According to this view, suits by employees for breach of a collective bargaining contract would not arise under 301 and would be governed by state law, if not pre-empted by Garmon, as this one would be, whereas a suit by a union for the same breach of the same contract would be a 301 suit ruled by federal law. Neither the language and structure of 301 nor its legislative history require or persuasively support this restrictive interpretation.

which would frustrate rather than serve the congressional policy expressed in that section. 'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' Teamsters, C. W. & H. v. Lucas Flour Co. *supra* (369 U.S. at 103).

"We conclude that petitioner's action arises under 301 and is not pre-empted under the Garmon rule. The judgment of the Supreme Court of Michigan is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

The changes in this case are basically that there was a refusal to pay proper subsistence and overtime according to the terms of the collective bargaining agreement. The record discloses that there was considerable dispute with respect to the interpretation of the overtime and subsistence provisions of the collective bargaining contract. The Trial Examiner himself pointed this out (R. 16). The Trial Examiner also noted that Utra received a check from Johnson in the sum of \$504.00 (GCX 12), through the Business Agent, Crumley. By Hoskins' own testimony it is noted by the Trial Examiner (R. 20) Johnson and Crumley discussed the overtime provisions of the contract. The Trial Examiner also noted the testimony of foreman, Schultz, with regard to a meeting between Johnson and Crumley, the Business Agent, on December 13, 1962, concerning a dispute as to the payment of wages according to the contract terms. It is apparent that there is nothing in the record which indicates that the Union ever requested the Respondent to bargain with them concerning the payment of overtime, nor is there

anything in the record to prove that anyone was not paid the overtime pay required by the contract. It is significant to observe that no official of the Union came forward to testify that Respondent did not bargain with them concerning overtime.

There is nothing in the Act to support the proposition that a breach of contract in payment of wages fixed by the contract would constitute unfair labor practice. Section 8 (a) (5) makes it unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provision of 9 (a). Section 9 (a) provides in part:

“Providing that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; providing further,” that the bargaining representative has been given opportunity to be present at such adjustment.”

There is no evidence other than the testimony of Utra and Hoskins to the effect that Johnson attempted to force the employees to work for time and a half instead of double time. It is submitted that when Utra and others talked to Johnson about their subsistence payments in the presence of Crumley, the Business Agent, all of these matters were lawful presentation of grievances, and were apparently settled.

Respondent submits that at most, the facts in this

case amount to a breach of contract and, therefore, redressable in the Courts and not before the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should dismiss the Petition of the Board.

PETER I. BREEN

*Attorney for Respondent,  
Tom Johnson, Inc.*

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

PETER I. BREEN

*Attorney for Respondent,  
Tom Johnson, Inc.*



## APPENDIX A

### UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

\* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

\* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

\* \* \* \*

### REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Providing that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; providing further, that the bargaining representative has been given opportunity to be present at such adjustment.



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15 U.S.C. §§1, 2, 15 . . . . .

28 U.S.C. §§1331, 1332, 1337 . . . . .

TEXTBOOKS

15 Am.Jur., Damages, §271. . . . .

22 Am.Jur.2d, Damages, §259. . . . .

24 Am.Jur., Fraud and Deceit,  
    §269. . . . .  
    §276. . . . .

25 C.J.S., Damages, 1966 Rev.,  
    §125(5) . . . . .  
    §126(1) . . . . .

37 C.J.S., Fraud,  
    §35 . . . . .  
    §39 . . . . .  
    §94 . . . . .  
    §95 . . . . .  
    §115. . . . .

4 Corbin, Contracts, §787 . . . . .

1 Harper & James, Law of Torts 541 (1956) . . . . .

    Keeton, Fraud - Concealment and Nondisclosure,  
        15 Tex. L. Rev. 1 . . . . .

    Morris, Punitive Damages in Tort Cases,  
        44 Harvard L. Rev. 1173 (1931). . . . .

11 O.Jur.2d, Contracts, §180 . . . . .

11 O.Jur.2d, Contracts, 1966 Supp., §180, p. 45. . . . .

4 O.Jur.2d, Fraud and Deceit,	
\$5. . . . .	20
\$20 . . . . .	6, 16, 38
\$76 . . . . .	16
\$77 . . . . .	16
\$151. . . . .	38
6 O.Jur.2d, Fraud and Deceit,	
\$204. . . . .	66
\$226. . . . .	16
\$230. . . . .	16
Oleck, Damages to Persons and Property (1961),	
\$275A, 560.3-.4 . . . . .	72
Prosser, Law of Torts 534 (1955). . . . .	37
Restatement, Conflict of Laws	
\$421. . . . .	70
\$612. . . . .	66
Restatement, Contracts, §133. . . . .	39
Restatement, Torts,	
\$529. . . . .	37
\$908, Comment (e) . . . . .	4
\$909. . . . .	5



LARRY P. SMITH, et al.,	Appellants,	)	
vs.		)	
HILLTOP REALTY, INC., et al.,	Appellees,	)	
_____		)	No. 21207
HILLTOP REALTY, INC., et al.,	Cross-Appellants,	)	
vs.		)	
LARRY P. SMITH, et al.,	Cross-Appellees,	)	
and		)	
THE AUSTIN COMPANY,	Additional Cross-Appellee	)	
	as to Count No. 4 Only.	)	

ON APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF HILLTOP REALTY, INC., et al.  
AS APPELLEES

INTRODUCTION

Appellants, Larry P. Smith & Co., its partners, executives and employees, including Treiger (R. 1058-9), are herein termed "Smith". Appellees, Hilltop Realty, Inc. (R. 1054), and the two Winslow sisters", Mesdames Ashcraft and Powell (R. 1055), are collectively termed "Hilltop". Cross-appellee on antitrust Count 4, The Austin Company (R. 1060), is termed "Austin". Where appropriate, individuals are identified by name, and the sisters as the Winslow sisters".

Hilltop's Answering Brief on Appeal supports the District Court's Findings of Fact of actual and gross fraud and its application of Law awarding compensatory and punitive damages and attorneys' fees (R. 1469ff, 2028ff). It is arranged by Fact with cross-reference to each of Smith's Specification of Error (cf. Smith Op. Br. 26-8).

Hilltop's Opening Brief on Cross Appeal is concurrent with the Answering Brief and was filed. It claims primarily that the District Court erred in its findings including:

1. That Hilltop's original and amended Complaints (R. 111-2), documented by its Contentions of fact (R. 651-91), state a cause of action for antitrust violation (R. 829-31) in granting partial summary judgment and dismissal (R. 953-54) which foreclosed Hilltop's demand for jury trial on the merits of its antitrust issues (R. 9, 114, 2147); and

2. That Hilltop did not sustain its burden of proof that Nutwood property, then owned by the Winslow sisters, had a market value of \$17,500 per acre as a regional shopping center site rather than the \$3,500 per acre which they accepted in reliance upon the fraudulent concealment by Smith of its improper purchase of Severance and of its fraudulently negative market analysis of Nutwood as a potential regional shopping center (R. 1469-70).



The District Court had jurisdiction of Counts 1, 2 and 3 by diversity and amount, 28 U.S.C., §1332 (R. 1ff, 100ff, 1053); and of the Sherman Act Count 4 under 15 U.S.C., §§1, 2 and 15, and 18 U.S.C., §§1331 and 1337.

Hilltop's Motions of October 26, 1966, to dismiss Smith's appeal for want of jurisdiction and because it violated this court's rules and practice governing length of brief and permissible contents of an appendix, is hereby resubmitted for reconsideration or rehearing at hearing on the merits under Rules 15 and 23 if not granted during the interim since setting in mid-November 1966. Without prejudice, Hilltop respectfully submits its Answering Brief on appeal.

#### ADDITIONAL MEMORANDUM DECISION RE PUNITIVE DAMAGES

Smith's Appendix (Smith App. 9-26) omits a Memorandum Decision (R. 1021-3) on its conflict of law issue of punitive damages (Smith Op. Br. 26-7, 35, 54-61). It is attached as Appendix A.

#### COUNTER-STATEMENT OF THE CASE

Hilltop does not accept all of Smith's Statement (Smith Op. Br. 2-26) and accordingly submits its counter-statement.

##### A. Questions Presented.

Smith's Appeal and its Specification of Errors present the following questions:

since there is sufficient oral and documentary evidence to support the Court's ultimate findings that Smith was guilty of actual fraud and of gross fraud under Ohio law because of Smith's extreme and exceptional conduct which was intentional and deliberate. (R. Vol. IV; Tr. Vols. I-XIII; and Exhibits filed)

2. Is the Court's finding of compensatory damages, based on Smith's bill for its uncompleted false report, supported by the evidence and within the Court's discretion? (R. 2029, 2030)

3. Do the findings support the Court's conclusion on the facts that punitive damages are properly awarded under Ohio law? (Memo Dec.\* R. 1469-74, 2028-39)

4. Is the Court's finding that Hilltop was fully justified in bringing this lawsuit supported by the evidence? (R. 1474, 1498ff, 2038; cf. R. Vol. IV; Tr. Vols. I-XIII; and Exhibits filed)

5. Is the Court's award of punitive damages based on Smith's actual out-of-pocket expenses, and of attorneys' fee which is reasonable under the circumstances, a reasonable exercise of the Trial Court's discretion? (R. 1474, 1498ff, 2038; cf. Restatement (Second) of Torts, §908, Comment (e))

6. Is Smith accordingly bound under Ohio law for such damages?

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\* Reprinted in Smith's Appendix using Transcript reference (Tr. Vol. IV, App. 9-26). An important difference is the Court's initial deletion of a significant statement (R. 2029, line 29). This statement does not appear in the Reporter's Transcript version (Tr. Vol. IV, line 4).

7. Did the Court correctly interpret Washington law of public policy in affirming Ohio punitive damage law against Washington defendants who voluntarily ventured into Ohio to perform their misdeeds? (Memo Dec. R. 1021-3; App. A)

8. Whether, accordingly, the Court's judgment on Smith's appeal should be affirmed, except as challenged by Hilltop's concurrently filed Opening Brief on Cross Appeal?

B. Summary of Court's Findings of Fact of Actual and Gross Fraud Warranting Compensatory and Punitive Damages.

Hilltop will first summarize the Court's ultimate Findings of Fact. In its Argument section, it will support each Finding in the same sequence, noting cross-references to Smith's differently arranged Specification of Errors. The Trial Court found:

Relevant Findings of Fraud Warranting Compensatory Damages:

1. Smith is liable for actual fraud in concealing from Hilltop its simultaneous negotiations to buy Severance while making its market analysis of Nutwood (R. 1471, lines 18-22);
2. This concealment was material to Hilltop's conduct (R. 1471, lines 22-3);
3. It caused Hilltop to falsely believe that Smith was no more than a consultant on Severance (R. 1471, lines 23-25);
4. This belief was knowingly and intentionally fostered by Smith (R. 1471, lines 24-26);

sultant in selecting it to do a market analysis of Nutwood on Smith's negative market analysis (Ex. 29), in determining course of conduct after it was received (R. 1471, lines 26-9

6. Hilltop relied on the negative conclusions of Smith's market analysis and not on its details in making its decision to sell Nutwood (R. 1470, lines 2-5);

7. Hilltop had a right to rely on an absence of such conflict of interest by an expert whose advice was sought because of the very nature of the relationship (R. 1471, line 29 - 147, 1);

8. Since the concealment of the conflict of interest and the Nutwood market analysis totally untrustworthy, Hilltop Realty suffered financial injury as a proximate consequence: Hilltop Realty was damaged in the amount of \$2,920 which it paid Smith for its market analysis (R. 1472, lines 1-6), and the Winslow sisters were damaged in a like amount of \$2,920 because, the fair value to them of a reliable and trustworthy market analysis was at least equal to the price which Smith billed Hilltop Realty (R. 2028, line 31 - 20, line 16; cf. R. 1472, lines 16-17).

The Court accordingly concluded that:

" . . . all eight elements of fraud under Ohio law have been proven by clear, cogent and convincing evidence. (R. 1472, lines 12-14)

24 O.Jur.2d, Fraud and Deceit, 635, §20.



Under Ohio Law:

The Court further found that punitive damages are recoverable under Ohio law because:

9. Smith's conduct showed a wanton or reckless disregard of the legal rights of Hilltop (R. 1472, lines 22-24);

10. The fraudulent concealment by Treiger of Smith's potential purchase of Severance was authorized by the respective managers of Smith's New York office and Eastern Division (R. 1472, line 32 - 1473, line 8); and within the scope of their respective employment by Smith (respondeat superior stipulated, Tr. 2306).

11. Smith's concealment was calculated, deliberate and intentional and done pursuant to company policy "as defendants so clearly demonstrate in their Post-Trial Brief\*, §XIII, p. 99, et seq." (R. 1473, lines 8-11);

12. The inferences are inescapable that one or more of the Smith partners were aware of the concealment and at least acquiesced therein because, of Smith's method of doing business, of keeping the partners informed in its far flung organization, and of its system of reading files (R. 1473, lines 12-16);

13. Treiger's later attempts to justify and minimize the concealment at his meeting of August 10, 1960, with Hilltop's

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This brief is Paper 260 in District Court Clerk's files. It was not designated by Smith for the Record on appeal. cf. Paper 304, also in District Court Clerk's file, and R. 2198, 2232.

advisor, O'Neill (R. 1054, 1060), must have come to the attention of, or may have been authorized by, one or more of the partners (R. 1473, lines 6-21);

14. Any of these factors, standing alone, supports the Court's finding that the original Smith partners are jointly and severally liable for actual and punitive damages (R. 1473, lines 22-27).

On reargument, the Court further found:

15. Although Smith was not motivated by "illwill or illwill" (R. 2030, lines 20-22), it was guilty of "extreme and exceptional conduct" which was "intentional and deliberate" constituting "gross fraud" under Ohio law (R. 2035, lines 17-20).

Relevant Findings That Hilltop Was Fully Justified in Prosecuting This Suit, Thereby Incurring Substantial Expenses:

The Court further found that:

16. The mistakes, errors and examples of unprofessional workmanship which Hilltop found in Smith's original Nutwood analysis (Ex. 29) of January 1960 (R. 1212), and later in its "substantiating report" (Ex. 10) of February 1961 (R. 1256), those which they subsequently continued to find, together with the concealed conflict of interest, and other suspicious circumstances which they discovered, fully justified the prosecution of this legal action (R. 1473, line 27 - 1474, line 6);

17. Although Hilltop has been unable to prove all of its suspicions, it has proved to the Court's satisfaction that it



lines 6-10).

On reargument, the Court further found:

18. Smith was obligated to provide a trustworthy market analysis which was rendered totally unreliable and highly suspect by its concealed pre-existing conflict of interest (R. 2029, lines 26-32).

19. Smith also deliberately withheld information, the disclosure of which would have rendered this expensive lawsuit unnecessary (R. 2030, lines 10-14);

20. The errors in the Smith market analysis (Ex. 29) and in the subsequent "substantiating report" (Ex. 10) which was also not free from error, the competitive positions of Nutwood and Severance and other suspicious circumstances:

". . . fully justified the prosecution of the fraud and contract counts . . . and also . . . the antitrust counts up to a point which the court need not determine . . ."  
(R. 2030, lines 1-8)

Thus, the Court awarded:

21. Compensatory damages based on Smith's bill for its false report and punitive damages based on out-of-pocket expenses of Hilltop Realty and of the Winslow sisters, and an attorneys' fee which it found did not adequately compensate Hilltop's counsel for all of the time devoted to the case but, considering all the circumstances, it thought reasonable (R. 2038, lines 15-30).

quoted in Smith's Appendix, but attached hereto as Appendix

Court concluded:

22. Ohio law of exemplary damages was properly applied to Washington defendants who voluntarily ventured into Ohio to commit their misdeeds (R. 1021-3).

#### CONCISE SUMMARY OF ARGUMENT

Smith's Brief ignores F.R.Civ.P. 52(a). It violates United States, 362 F.2d 899, 901 (9th Cir. 1966), by relying on various "remarks" of the Trial Court which are "erased" by its Findings. It rejects both the Washington and Ohio rules of quantum of proof in fiduciary cases of fraud.

The Trial Court's findings of actual and gross fraud justifying compensatory and punitive damages are abundantly supported by the evidence. They were based on credibility of witnesses and documentary evidence in a fraud case which particularly involved the

"... fact finding tribunal's experience with the mainsprings of human conduct."

Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1966)

F.R.Civ.P. 52(a).

The Court correctly concluded that punitive damages should be awarded in a Washington trial of defendants who voluntarily ventured into Ohio to commit their misdeeds. See Memorandum of Decision (R. 1021-3) attached as Appendix A.

1475, 2028, 11) It determined that reimbursement of litigation expense and modest attorneys' fees considering the time spent was a proper basis for punitive damages (R. 1469-74, 2036-37). It awarded compensatory damages to Hilltop and the Winslow sisters of \$2,920 each, based on Smith's charges for its negative report; and punitive damages of \$40,000 to Hilltop and \$35,000 to the Winslow sisters; and \$75,000 to them jointly as a reasonable attorneys' fee (R. 2038). It did this only after Hilltop submitted detailed records of its litigation expenses (R. 1498, 1579-1611) and time estimates (R. 1500-2; 1508-1518); and of its attorneys' time records (R. 1498-1500; 1529-1678).

Clearly, this was a careful and reasonable exercise of judicial discretion. Smith had been authorized to cross-examine any witnesses on all expense or time phases (R. 1490) and Hilltop offered to produce them (R. 2013). Smith filed Exceptions (R. 1914-1912) which Hilltop denied (R. 2013). Smith then waived oral cross-examination, and stipulated that all expenses were incurred and paid (R. 2023), reserving only whether necessarily or reasonably so (R. 2023-4); and that attorneys' fees could be determined solely upon oral argument and records filed (R. 2021-2). At oral argument, Hilltop fully explained its detailed expense and time records (R. 2043-63) pursuant to the Court's direction that the scheduled argument should be limited to these factual matters (R. 2028). But Smith abandoned that schedule. Instead, one day

"... sua sponte filed a brief raising issues of law relative to punitive damages which the court thought had been decided and laid to rest long ago." (R. 2028)

Smith then reargued, chiefly that punitive damages and attorneys' fees could not be awarded under Ohio law, with brief attention to expense or time records (R. 2063-2110).

As a result, the Court again reviewed its prior Memorandum Decision (R. 1469ff) and reaffirmed that an award of punitive damages and attorneys' fees is proper under Ohio law (R. 2028ff) which it had previously concluded was enforceable in Washington (R. 1022).

Smith does not claim the Court abused its judicial discretion. The amount of punitive damages normally left to a jury should be upheld a fortiori where a Trial Court has carefully sought, explained and applied its modest award which only reimburses out-of-pocket expenses of litigation arising out of manifest gross fraud; and reasonable attorneys' fees determined in a proper manner. The Court carefully exercised its discretion,

Twentieth Century Fox v. Goldwyn,  
328 F.2d 190, at 221-2 (9th Cir. 1964).

Accordingly, the judgment on Smith's Appeal should be affirmed; except in other respects noted as Specification of Errors in Hilltop's concurrently filed Opening Brief on Cross Appeal.



A. Applicable Principles on Review.

F.R.Civ.P. 52(a) Governs Appellate Review:

Smith repeatedly and erroneously claims the facts are almost entirely undisputed (Smith Op. Br. 1, 11, 15, 16, 31, 40), but its appendix of 60 pages of selected Transcript excerpts from a 12-day trial to support its factual contentions (Smith App. 88-147), and 3 pages from some 200 pages of Admitted Facts (R. Vol. IV) chosen for the same purpose (Smith App. 26-88), protest too much. The trial Court, on all of the evidence and after extensive briefs, made findings that reject Smith's claim.

Smith's Brief is silent as to F.R.Civ.P. 52(a). This rule applies whether or not the trial court has had opportunity to judge the credibility of witnesses, and it:

". . . should not . . . encourage appeals . . . based on the hope that the appellate court will second guess the trial court."

Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962).

The principal witnesses testified in person, as well as by depositions, so there was a clear opportunity to judge the credibility of witnesses in vastly conflicting evidence; even in divergent statements by opposing witnesses in the Admitted Facts. For example only, compare Treiger's version of the meeting of October 8, 1959 (R. 1190-1) quoted in full Text (Smith App. 47), and O'Neill's version (R. 1191-4) only partially quoted (Smith App. 7-9), particularly the content deleted (R. 1192, line 21 - 1193,

and erroneously claims "the two memos are not in conflict and occurred" (Smith Op. Br. 11). Hilltop submits that, only a comparison of the Record and Transcript, will reveal the substantial differences.

Smith's Unauthorized Reliance on "Intervening Remarks of the Court":

Smith's Brief seeks to buttress its Specification of Error by partial quotes from intervening pretrial and post-trial proceedings during successive hearings. It calls these, "oral opinion" (Smith Op. B. 2); or "tentative oral opinions" (Smith App. 1); or "statements at oral argument" (Smith App. 1, 15). During the lengthy record, the Court made many oral remarks which might be invoked by either side. The short answer is that all such "remarks" are merely the Court's two Memorandum Decisions which comprise its Findings of Fact and Conclusions of Law (R. 2038-9). This Court has previously currently held in Ogle v. United States, 362 F.2d 899, 901 (1966):

"Ogle partially relies on remarks made by the trial court as the trial progressed . . . but such remarks must be considered erased by the findings of fact ultimately made . . ."

The Burden of Proof in a Fiduciary Case:

Smith contends\*that the burden of proof here is almost identical to a criminal case, citing Asheim v. Pigeon Hole Parking, Inc., 175 F. Supp. 320, 328 (ED Wash. ND 1959), affirmed 283 F.2d

\*Smith Op. Br. 42.



The trial court's opinion, on wholly different facts, was derived from an earlier Washington case which quoted a portion of 37 C.J.S. Fraud, §94. But those facts did not require reference to its footnote 98, p. 400, captioned, "Fiduciary or Confidential Relationships as Exception", nor to its cross reference, §95, pp. 401-402, that there is a presumption of fraud by fiduciaries which alters the burden of going forward with evidence:

". . . to show that his conduct was free of fraud."

The Trial Court found a fiduciary duty by Smith when it accepted employment as an expert for Hilltop because of the "very nature of the relationship between the parties" (R. 1471). In its prior Memorandum Decision dismissing the antitrust counts, the Court held:

"By plaintiff's own allegations its injury was caused by the fraudulent breach of a fiduciary duty." (R. 829, lines 26-28; cf. R. 1450)

Accepting Smith's premise that Washington law governs the "quantum of evidence" required (Smith Op. Br. 41), Crocker v. Boyd, 88 Wash. 685, 687, 153 Pac. 1076 (1915), is applicable:

"The law, as is so often said, does not presume fraud. Except in fiduciary cases, it extends no presumption to those who charge it." (Emphasis added.)

In re Uzafovage's Estate, 153 Wash. 620, 623, 280 Pac. 85 (1929).

Westerbeck v. Cannon, 5 Wn.2d 106, 120, 104 P.2d 918 (1940).

§§76, 77, 226, 230.

The evidence summarized below shows a clear advantage Smith in concealing its purchase of Severance and in rendering a negative report on Nutwood because Smith knew (Treiger, R. 1) what Petti did not (cf. Petti, Tr. 161) "the competitive position of Nutwood and Severance", as the Court so found (R. 2030, 1).

Thus, F.R.Civ.P. 52(a), the erasure of "remarks", and the decision of going forward by a fiduciary, are controlling factors in Smith's Appeal.

B. The Court's Findings Of Fact Are Supported  
By The Evidence And Its Conclusions Of Law  
Properly Apply Ohio And Washington Law.

Hilltop's Proof Of The Eight Elements Of Actual Fraud

Smith's Brief concedes its Appeal turns largely on whether the Court's findings of actual fraud (R. 1471-2, 2034-5) is supported by clear, cogent and convincing evidence as to each element (Smith Op. Br. 41). Smith apparently concedes it was aware of four of the eight elements, 24 O.Jur.2d, Fraud and Deceit §20, because it claims four are missing: intent to deceive, materiality, reliance, and damages (Smith Op. Br. 26). Since the four elements, to a degree, are inter-related and overlapping, since Smith's arguments are interspersed throughout its Brief (cf. Smith Op. Br. 3-5, 8-12, 15-20, 24-26, 28-32, 40-51), we will document briefly each of the Court's eight Findings of

This is conceded in the Admitted Facts (R. 1248, ¶317).

Finding No. 2 of Materiality (supra, p. 5)  
[Smith's Spec. of Error No. 1]

When Smith received Hilltop's initial letter inquiry, its Account Executive, Treiger, immediately originated a "long" telephone call to Hilltop's President, Petti (R. 1188-9).

In accordance with company practice, he made an interoffice memorandum of his call to the "reading file". It is regularly distributed to Smith's various offices and is "available to everyone in the Smith organization" (Treiger, Tr. 1764); so that they can know what is going on (Head, Tr. 688-9; Imus, Tr. 737, 748-9, 68-9; Orrico, Tr. 2099; Smith, Tr. 2451-2), including report writers (Darmstadter, Tr. 807), and partners (Orrico, Tr. 2099; Smith, Tr. 2451-2). The distribution includes not only interoffice memoranda but also incoming letters. Thus, Hilltop's initial letter of inquiry (Exs. 27, 28) shows xeroxed distribution to all of Smith's offices.

Treiger's first reading file memorandum pertaining to Hilltop was reported "to everyone in the Smith organization" that Nutwood was in Severance's secondary trade area but that Petti "is not aware of course of our possible ownership position there", and that Nutwood would have regional access after the freeways "are completed" (R. 1189). But, in all Treiger's negotiations with Petti, he never disclosed to Petti either this trade area overlap between

He only told Petti ambiguously that "we are working" or "we were working" (R. 1189) or "had worked" (Tr. 163-4) on Severance and that "there might be some conflict in our own action" (R. 1189). These half-truths did not reveal to Hillt Smith's pending purchase of a competitive shopping center as Petti testified:

"He asked me if I knew that they had worked on the Severance property. I told him I did. He expressed some doubt as to the ethical position that they were in and would need some time to see whether they could take on our job, and this was the entire revelation that he had given me relative to the Severance Center. (Tr. 163-4)

Treiger asked Orndahl, then manager of Smith's New York how to handle this "in view of our possible investment in Severance" (R. 1189). Smith concedes, at that very moment "Orndahl was involved in negotiations looking to the possible chase by the Smith firm of an interest in Severance" (Smith Br. 10).

In a later "reading file" memorandum, Treiger said he had spoken to Orndahl who agreed "we ought to try and handle" the request (R. 1190). He again talked to Petti and told him:

". . . as long as he recognized the fact that we have been acting on the Severance Estate for some three years, we believe we could act for him." (R. 1190)

Treiger said not a word about Smith's impending purchase of Severance, and reported that Petti accordingly replied:



[Smith] had taken four days to think about the ethical conflicts of interest problem." (R. 1190). (Emphasis added.)

Meanwhile, Petti had also been working on developing Nutwood since 1958 on behalf of the Winslow sister owners through O'Neill, their long-time family attorney and business advisor (R. 1060, 137). He came to the conclusion that he needed expert assistance to develop Nutwood as a regional shopping center (Tr. 154) and selected Smith as having the greatest stature (Tr. 156).

Smith now argues that the concealment is not "material" (Smith Op. Br. 30-31) and that "all relevant evidence" indicates that, if Hilltop had known that Smith was buying Severance, it could have hired Smith anyhow because Petti believed that Nutwood and Severance were noncompetitive (Smith Op. Br. 30-31, 45-6). Should erroneous economic beliefs of non-experts who agreed to pay \$4,500 for what he believes to be an independent expert, be relevant to materiality, either of Hilltop Realty or the property owners, the Winslow sisters?

The evidence shows Hilltop wanted an objective study by an expert consultant (R. 1169), not an incipient competitor who at once recognized the "competitive positions of Nutwood and Severance" (R. 1189, line 2, 2030, line 3). So did the owners and their attorney (Ex. 371, p. 164). Petti knew nothing of the impending Smith purchase, but thought Higbee and Halle's location at Severance was an accomplished fact because of the February 22, 1959, newspaper announcement (Petti, Tr. 164; R. 1153):

all practical purposes their work [at Severance] had been accomplished, had been successful and we were hoping to would be ready for another job and would do equally as good a one for us." (Petti, Tr. 164)

Nor did Petti know the vital department store leases had been executed until over ten months later, on December 22, 1959 (R. 1205, 1207); nor that Smith's pending purchase of Severance was wholly "contingent upon execution of these department store leases" (Ex. 313, p. 2, ¶6).

Clearly the concealment was material to the goal of Hilltop Realty and the owners to promote Nutwood by an expert's "on study" (Treiger, R. 1189).

Finding No. 3 of Hilltop's Belief that Smith Was No More Than A Consultant (supra, p. 5). [Smith's Spec. of Error No. 1]

This appears self-evident. Smith made no disclosure until long after Hilltop sold Nutwood on April 29, 1960 (R. 1238). Smith meanwhile was negotiating to buy Severance from Austin who had bought it (R. 1225, 1248).

Finding No. 4 of Smith's Intent To Deceive (supra, p. 5). [Smith's Spec. of Error No. 1]

Smith contends in effect that Smith's concealment did not meet the test of 24 O.Jur.2d, Fraud and Deceit, §5, (Smith 28-9). But its very quotation convicts. When Smith withheld from Petti the critical knowledge of Smith's "possible ownership" or "possible investment position" in Severance (R. 1205) was clearly an "intention" or "cunning deception . . . used



Smith misquotes the Court as finding that Smith was not actuated by "malice or illwill" (Smith Op. Br. 29). It found that Smith's action was not motivated by "illwill or hatred" (R. 2030). And it did this only in a context of rejecting Smith's argument that a fraud case required these personal elements. The Court found Ohio law authorized punitive damages, in the disjunctive, where the action is for "fraud, malice or insult or wanton and reckless disregard of plaintiff's rights" (R. 2031).

Smith also contends that the Court found Smith's sole motive was to carry out a commitment to Austin to keep the negotiations confidential, relying on oral "remarks" of the Court (Smith Op. Br. 9). The Court made no such finding. Ogle, supra.

Smith did not claim error (Smith App. 26), in the Court's direction that its two Final Memorandum Decisions

"... shall serve as findings of fact and conclusions of law." (R. 2038-9)

rather ignores them when the Court's intervening "oral remarks" seem beneficial. To utilize, as Smith does throughout its Brief, oral remarks as though they were findings is clearly erroneous, Ogle, supra.

Moreover, if pertinent, the remarks relate to "direct financial profit" as contrasted with Austin's "goodwill". There is evidence, meeting the "clearly erroneous" test of F.R.Civ.P. 2(a), that it was Smith who opposed publicity (R. 1177). On



stood as a real threat to Smith's commitment to buy Severance. Smith knew that, if Nutwood came into being, it would have diluted Severance (Marshall, Tr. 1689). Smith knew that a favorable report on Nutwood would have been of benefit to its development (Steinberg, Tr. 587) and that Nutwood would be competitive with Severance even though it was not in its primary trading area (Steinberg, Tr. 589) and that driving time between Severance and Nutwood was only about twenty minutes (Steinberg, Tr. 596).

Scarcely had Smith begun its work for Austin in 1955 to develop Severance into a regional shopping center, when one of their primary prospective department store tenants, The May Co., announced it would construct its branch store 1-1/2 miles from Severance at Cedar Center (R. 1066).

The other primary prospective tenants, Halle (R. 1085) and Higbee (R. 1086) were concerned about the blight in the old residential area near Severance and the deterioration of the population nearby within the next 20-year period and thought seriously of going "farther out into suburban areas . . . where blight would not catch up to the location for a good deal longer" (R. 1089-90).

Smith was continuously concerned about:

". . . the risk of a third development taking place . . . on the east side . . ." (R. 1108, lines 16-20)

ing participation in its purchase of Severance, that:

"The only really significant competition that Severance faces on the east side is the large May Co. . . . branch store a couple of miles away . . ." (R. 1158)

and enclosed a brochure which summarized Smith's five year struggle to execute long-term department store leases which

". . . took the usual stormy course with competing properties keeping the negotiations off balance . . .

and that its purchase was

". . . contingent upon the department store leases being concluded." (Ex. 313, p. 2, ¶¶1, 6)

Meanwhile, Petti, Hilltop's president, had worked on convincing Nutwood as a regional shopping center, seeking to obtain a department store as a dominant tenant. He "came to the conclusion that I would need expert assistance if I was going to talk about the end results which we were seeking" (Petti, Tr. 14)

While Severance and other eastern Cleveland potential tenants had encountered zoning problems (Smith Op. Br. 21; R. 110), the favorable zoning of Nutwood was a reasonable likelihood (R. 110).

Based upon all of this knowledge, Treiger's pursuit of Nutwood confirms an intent to deceive. Petti did not, as Smith asserted, initiate Treiger's coming to Cleveland for a meeting (Smith Op. Br. 11). On the contrary, it was Treiger, in writing to Petti on September 30, 1959, enclosing his written proposal, who

"if you feel, however . . . that a preliminary discussion or personal meeting with a representative



us to undertake the work we would be happy to arrange such a meeting in Cleveland at your convenience or that of your principals." (Ex. 33)

It was Treiger - not Petti - who called on October 5, 1959, to find out the status of its proposal and then reported that Petti had asked for the personal meeting which Treiger had suggested (Ex. 35; R. 1190).

On October 8, 1959, Treiger reported in an interoffice memorandum that Smith had "a 60-40 chance of landing the job" (R. 1191). Treiger continued to pursue Petti - on October 19, 1959 (R. 1195), on November 16, 1959 (R. 1197), and on December 4, 1959, agreeing to installment payments of the fee (R. 1202).

The negative report itself shows further intent to deceive on its face. When the field work was undertaken, the report writer, John Marshall, delineated Nutwood's primary trading zone as a 3-mile radius extending north across Euclid Avenue to Lake Erie (R. 1204). The field man, Darmstadter, knocked out the area north of Euclid Avenue which contains the densely populated village of Euclid (cf. Plate 1, Smith Op. Br.) because of the "industrial belt" (R. 1206). However, as early as 1955, a Smith report on Severance (reprinted in January 1960) concluded this same industrial belt "will not seriously impede shopping trips of customers traveling to Severance" (Ex. 118, p. 21; Tr. 1683). Neither Darmstadter, the Field Man, nor Marshall, the Report writer, was ever told about the report by Treiger (R. 1723; Tr. 1681).

However, the trade area of Nutwood was changed from a circle delineated by Marshall including the population north of Euclid Avenue and the populous Village of Euclid to an ellipse shape that bordered Euclid Avenue on the north and excluded the population (Ex. 29, facing p. 1).

Darmstadter does not recall being shown a then current report of the Cleveland Planning Commission of "Shopping Center Opportunities in Eastern Cleveland" which had been furnished to Smith (Tr. 1723-4; R. 1181; cf. Ex. 209B).

One further example of intent to deceive is the willful withholding of the 3-page "INTRODUCTION" (Ex. 175) to the Nutwood report (Ex. 29). This unused Introduction would have been of great value to Hilltop (Tr. 837-8). It contained vital information concerning Montgomery Ward and other potential tenants for New Hilltop (Ex. 175). It is marked "Not used in report" and "None of it used in report to client". It was Treiger who decided to withhold it (Tr. 1576). No possible explanation is given for the deletion except at trial Marshall said it was "a little too formal" and it was better to have Treiger's covering letter (Ex. 29; Tr. 1675). But Smith's own "substantiating report" (Ex. 10) begins with an "INTRODUCTION" as do most of Smith's other papers, e.g., Ex. 11, captioned "Work Book".

It is submitted that, under F.R.Civ.P. 52(a), there is abundant evidence of intent to deceive to support the Court's



Fostered by Smith.

Finding No. 3 that Hilltop's Reliance on Smith's Negative Report Determined its Future Conduct  
(supra, p. 6). [Smith's Spec. of Error No. 1]

This appears to be conceded. However, Smith argues for argument that O'Neill and Petti relied upon Treiger's statements as to Smith's consulting relationship when they sold Nutwood (Smith Op. Br. 47). It never argues otherwise. Instead, it contends:

"... such reliance would be of no consequence unless they relied on the Smith report and the Smith report was incorrect." (Emphasis by Smith) (Smith Op. Br. 47)

Smith poses a false premise by analogy to a broker's statement of precise figures of income, etc., as accurate. Here, we have no precise figures but, instead, a report which Hilltop learned after its reliance and sale of Nutwood was far from precise, and based exclusively on judgments that can differ widely as to volume of business, size of trade area, "suburban share" and "effective competition" (Smith, Tr. 2355-7). Long after Hilltop sold Nutwood in reliance on Smith's negative report, Treiger told Petti and O'Neill for the first time that in its market analysis:

"Differences of opinion can exist in connection with the same set of facts . . ." (R. 1247)

While these sophisticated economic facts may be true, Hilltop did not know this. It is no defense to a wrongdoer to call attention to his victim's "gullibility". Ganness v. Moses Lake

Accord: Royal Air Properties, Inc. v. Smith,  
333 F.2d 568, 572 (9th Cir. 1964).

Clearly, in such a "judgment" area, and regardless of ideas, Hilltop would not have employed or relied on the ne report by a so-called "independent consultant" who was buy Severance and concealed from the start their knowledge, as market analysts, that Nutwood was in Severance's secondary area and "in a pretty strategic location" (Treiger, R. 118 Petti, Tr. 161, 234).

Finding No. 6 of Hilltop's Reliance On Smith's Negative Conclusions In Selling Nutwood (supra, p. 6). [Smith's Spec. of Error No. 1]

Once again, Smith lifts from "remarks" of the Court under Ogle, supra, are erased by its Final Decision, some from oral argument April 22, 1966 (R. 2089; Smith Op. Br. 17). But Smith concedes immediately afterwards:

"... the court held that the 'plaintiffs relied on the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills.'" (Smith Op. Br. 47; R. 140)

Smith's chief reliance is upon a statement by Petti on cross-examination that he accepted the favorable portions of Smith report such as good access but did not rely on the negative aspects that there was too much competition to which answered: "I think that was precisely my conclusion as to report" (Smith Op. Br. 16).

could see with his own eyes the land, population, access, etc.

He did not understand the sophisticated economic language of the Smith methodology (Tr. 231, 342-5). He always believed that the site was desirable. But just previously, he was asked:

"Q. Did anything occur between January 18 [1960] the date of Mr. Treiger's conference with you in Cleveland and January 29 [1960] to change your mind that Nutwood was suitable for a regional shopping center?

"A. I don't think anything changed my mind. The only thing was the report submitted to me that caused us to abandon our program. It didn't mean that somebody else couldn't take it on." (Tr. 399)

He testified on redirect that he and his associates accepted the conclusions as to the negative potential for Nutwood (Tr. 442) and that:

"If I answered other than the fact that we accepted their conclusions on cross examination, I certainly didn't intend to." (Tr. 442-3)

The Winslow sisters, owners of Nutwood, had moved from Cleveland and desired to sell Nutwood (R. 1055). They had no real estate experience (Tr. 76, 121) and relied on O'Neill, their long-time family attorney and business advisor, about the sale of the property (R. 1060). When Petti first called on a Winslow sister at Nutwood, she referred him to O'Neill (Tr. 147).

In May 1958, Petti and his chief advisor on Nutwood, Crume (Tr. 472), first called on O'Neill and recommended that Nutwood be developed or sold as a proposed regional shopping center site

(Ex. 381, p. 18) because Hilltop believed it would yield a "much higher price per acre than . . . for any residential development" (Ex. 371, pp. 22-3) and, accordingly, proposed an accelerated commission if the Winslow sisters' property was successfully promoted as such a site (R. 1138).

Hilltop Realty was a small real estate company in the suburbs of Cleveland engaged primarily in residential sales (R. 1054). Petti, its president, was self-educated except for two years of high school. He had worked for his father as a cement finisher, contracted tuberculosis and spent several years in a sanatorium, then worked as a taxi driver, and finally as a real estate salesman (Tr. 143-4). He had had very limited experience with two neighborhood shopping centers - supermarket, drug store, bank, etc. (Tr. 145), but no technical knowledge of economic study for regional shopping center development (R. 1045). In the Spring of 1959, he attended his first shopping center convention and was impressed by defendant Larry Smith's participation in a panel discussion (Tr. 153). As a result,

" . . . came to the conclusion he would need expert assistance . . . to bring about the end results . . . we were seeking . . . on the Nutwood property." (Tr. 154)

In September 1959, he wrote identical letters to Smith and to two other nationally recognized market analysts, and Perry Meyers (Ex. 371, pp. 12, 13). The letters described Nutwood's location in Cleveland, its prospective freeway access,



tions were requested as to the proper "type of market analysis" and fee quotation (R. 1188). Their various fees were comparable in a \$4/5,000 range, and each indicated familiarity with suburban Cleveland shopping center developments (Exs. 204, 217, 32). Hoyt and Meyers replied by letter (Exs. 204, 2d sheet from bottom, 217). Treiger made his "long" telephone call to Petti (R. 1188-9)

Larry Smith is a charter member of the American Society of Real Estate Consultants. He served on its Professional Ethics Committee (R. 1062) which drafted a Code of Professional Ethics. It provides that each member will:

"Accept counseling assignments only when there is no conflict of interest, unless after full disclosure all parties concerned approve the basis of acceptance."  
(Ex. 20; R. 1062)

But, although Hilltop ultimately selected Smith to make the market analysis of Nutwood for \$4,500;

"Smith did not at any time before August 10 or 12, 1960, disclose to plaintiffs or Mr. O'Neill that Smith was negotiating to buy Severance from Austin or that it had bought Severance from Austin." (R. 1248)

Smith also claims that two letters "give the lie" to reliance and "cast a dark shadow on Petti's integrity" (Smith Op. Br. 19). Nothing could be further from the truth. Exhibit 348B on the interleaf between pages 18 and 19 of Smith's Brief is just like many identical letters that he had written before retaining Smith, cf. letter of July 15, 1959, to Mr. Sidney Galvin

letters (Ex. 371, pp. 114-6, Ex. 235).

Exhibit 348A confirms reliance on Smith's negative re  
by deleting after January 15, 1960, paragraph 4 of the let  
June 12, 1959, referring to department store potentials.  
reference on page 3 is to an investigation of soil conditi  
utilities; not economic feasibility.

There was no reason to withhold these letters nor di  
have any knowledge of why they were missing (Petti, Tr. 4)  
Crume made the file search and does not recall that copie  
turned up (Tr. 473). Smith claimed like difficulty in loc  
files, cf. Tr. 2513-5.

Smith also claims that Kammer's evidence is controll  
(Smith Op. Br. 19-21). But Kammer made earlier offers fo  
Ratner to buy Nutwood (Tr. 1661). All of the res gestae,  
before any lawsuit was dreamed of, support Petti's contray  
testimony. Thus, on August 3, 1959, he wrote O'Neill the  
conferred:

" . . . with Harry Ratner . . . and his attorney,  
Karl Kammer. A week later he met with Albert  
Ratner . . . and the senior members of the Ratner  
clan . . . they insist they want [Nutwood] for  
residential development; . . . that it cannot sup-  
port retail or commercial development . . ."  
(Ex. 371, p. 107)

Res gestae is admissible in a fraud case, Dormitzer v.  
Saving & Loan Society, 23 Wash. 132, 200-1; 62 Pac. 862 18  
24 Am. Jur., Fraud and Deceit 108, §269.



which the Court's attention is particularly invited. They include O'Neill's letters of December 3 and 11, 1959, recommending to the Winslow sisters a 90-day extension of Hilltop's exclusive to comply with Smith's predicted time (R. 1190) to complete its report (Ex. 371, pp. 142-3, 152); Petti's of December 4, 1959, that it was employing Smith at Hilltop's expense and proceeding "independently of the Ratners or DeBartolos" (Ex. 371, p. 145); O'Neill's of January 6, 1960, reporting on the Higbee-Halle agreement re severance, stating:

"Since Smith made a study of . . . Severance . . . it will be interesting to see what he thinks its influence will be on . . . Nutwood . . ."  
(Ex. 371, p. 156);

Treiger's "reading file" memo of January 18, 1960, that O'Neill, Petti, Crume, etc. "accepted our conclusions" and are now planning recreational land uses (R. 1212); Hilltop to O'Neill of January 19, 1960, of that meeting with Treiger and recommending that an intervening Harry Ratner offer of January 13, 1960, to purchase Nutwood at \$3,500 per acre be given strong consideration (Ex. 371, pp. 162-3); and most significantly O'Neill's to the Winslow sisters of January 22, 1960, summarizing Smith's negative conclusions, and Treiger's visit and discussion of recreational land uses, and believing Ratner's offer was for residential uses, concurring in Petti's of January 20, recommending that strong consideration of Ratner's offer be given by the Winslow sister owners, and

(Ex. 371, pp. 164-7); Petti to DeBartolo of January 28, 1960, referring to Smith's report and making it available (Ex. 371, p. 169); Mrs. Ashcraft to O'Neill of February 19, 1960, expressing some doubt about the Ratner offer (Ex. 371, pp. 171-2); O'Neill's urgent recommendation to accept the offer (Ex. 371, pp. 173-4); Mrs. Ashcraft's reply of February 29, 1960, querying Smith's sudden "downgrade" of the whole idea "and then suddenly up" with Ratner's offer -- "I suppose no connection -- I know nothing about" but expressing her complete confidence in O'Neill's judgment and "full approval to go ahead" (Ex. 371, pp. 181, 182); Mrs. Ashcraft's cabled concurrence in Mrs. Ashcraft's agreement to sell on March 19, 1960 (Ex. 371, p. 185); Petti to Treiger of March 19, 1960, paying Smith's bill in full and saying:

"Notwithstanding . . . your analysis results were . . . negative . . . we do feel you have done a very commendable job. We shall look forward to working with you in the future . . ." (Ex. 47);

Treiger's reply of March 22, 1960, that he:

" . . . shared your disappointment in the outcome of the analysis"

and hoping "to get together on some future trip to Cleveland" (Ex. 48). Not a word was suggested of Smith's intervention in the purchase of Severance on February 10, 1960 (R. 1229). Nor did Treiger ever hear from afterwards until the concealed fact was discovered (R. 1248).

not the plaintiff. It is Hilltop. He was one of three "partners", Petti, Aveni and Baudo, in January 1960 (Tr. 442). Each of them, and Crume and O'Neill "accepted" the negative conclusions of Smith's report (Tr. 442). Clearly, Hilltop relied. In addition to abundant evidence that Petti relied, his chief advisor, Crume, relied and thought the project "was dead" after receipt of Smith's negative report (Crume, Tr. 486). He asked Treiger at the January 8, 1960, meeting if Smith's negative report meant that "up to and beyond 1970", the existing facilities

"[are] . . . even now tremendously overbuilt . . ."

to which Treiger, in effect, replied:

"That is what the facts would seem to indicate."  
(Crume, Tr. 487-8)

Small wonder that Treiger's "reading file" memorandum of this meeting told the Smith partners and all of the professional staff having access to the file that they "accepted our conclusions" (R. 121).

Vincent Aveni relied. He remembers the conversation with Treiger and Petti "on other possible uses of the property after their negative report" (Aveni, Tr. 524).

He knew Petti had gone to a shopping center convention in 1959 and had been impressed with Smith's statement that:

"Experts can pretty well predict . . . the value of any particular site for a shopping center . . . and Petti felt . . . before we could proceed with any major tenants it was going to be necessary to have a qualified report from a top market analyst . . . and he had suggested . . . Smith . . . would be the best, based on what was said at . . . convention . . ."

until after the Smith report (Aveni, Tr. 540).

The oral testimony of reliance confirms the res gesta person claiming to have been defrauded may testify to his upon representation made to him, particularly in a confidential relationship, 24 Am.Jur., Fraud and Deceit, §276; 37 C.J.S. Fraud, §§35, 39; So. Pac. Co. v. Libby, 199 F.2d 341, 348 (9th Cir. 1952). The concealment need not have been the sole cause of the plaintiff's action. It is sufficient if it is one of several inducements that exerted a material influence, 37 C.J.S., §39.

Under F.R.Civ.P. 52(a), there is abundant evidence of reliance by Hilltop's then three partners, and Crume and O'Neill (Tr. 442), and by Petti (Tr. 238-43, 294, 323, 345-7, 230-3), Aveni (Tr. 524), Crume (Tr. 486-8), Mrs. Ashcraft (Tr. 785, 87, 97-8, 107), Mrs. Powell (Tr. 122-4, 138), and the O'Neill (Tr. 442, 1868-70, R. 1218-21, 1215-6, 1248).

Finding No. 7 of Hilltop's Right To Rely On Smith's Report (supra, p. 6). [Smith's Spec. of Error No. 1]

While Smith flags this finding as part of its Specified of Error No. 1 (cf. Smith App. 12), we find nothing in it that challenges the fiduciary relationship or duty.

In S.E.C. v. Capital Gains Bureau, 375 U.S. 180, 114 S.Ct. 237, 84 S.Ct. 275 (1963), a unanimous court held:

"The content of common-law fraud has not remained static . . . it has varied for example, with . . .



and that:

"Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith and full and fair disclosure of all material facts' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 375 U.S. at 194.

The court cited:

Prosser, Law of Torts (1955), 534-5;

Keeton, Fraud - Concealment and Nondisclosure, 15 Tex. LRev. 1

1 Harper & James, Law of Torts (1956) 541.

Accord: Cord v. Smith, 338 F.2d 516, 524-5 (9th Cir. 1964).

Clearly, the Court's finding No. 7 of Hilltop's right to rely on Smith is correct on the facts and law.

At best, all Smith ever told Hilltop or O'Neill were gross half-truths relating to its "pre-existing consulting relationship" with Severance (Smith Op. Br. 4, subpara. 2). In Equitable Life Ins. Co. v. Halsey Stuart Co., 312 U.S. 410, 425-6, 85 Law ed.

920, 61 S. Ct. 623 (1941), a unanimous Supreme Court quoted with approval, Restatement Torts, §529, that:

"'A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation' . . . Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue." 312 U.S. at 426.

As this Court held, even in a criminal statutory mail fraud case, Cacy v. United States, 298 F.2d 227, 229 (9th Cir. 1961):

"Deceitful concealment of material facts is not constructive fraud but actual fraud."

" . . . fraud need not be proven beyond a reasonable doubt . . . "

Mensik v. C.I.R., 328 F.2d 147, 150 (7th Cir. 1964).

Finding No. 8 of Compensatory Damages Was A Reasonable Exercise Of The Court's Discretion (supra, p. 6). [Smith's Spec. of Errors Nos 1, 2, 3, 4]

The Court found that all eight elements of actual fraud under the law were proven (R. 1472), 24 O.Jur.2d, Fraud and Deceit

On damages. Smith quotes only a negative portion of 24 O.Jur.2d, §151 (Smith Op. Br. 50). The section begins

"Financial damage is not necessary to the existence of fraud. Although it is sometimes stated that the injury must be one that results in damage in a pecuniary sense, the loss or injury need not necessarily be of a specific pecuniary character. It is sufficient if the fraud has resulted in the loss of a right which the law recognizes as of pecuniary value . . . "

The damage to Hilltop appears clear. In an area where reputation is a factor and many different conclusions can be reached, obviously Hilltop would not have agreed to a \$4,500 fee, or paid Smith's reduced bill of \$2,920, for a report from a competitor.

The Winslow sisters likewise suffered actual damage which the trier of the facts could reasonably measure by the price paid for the untrustworthy report. They, too, were denied a report by an impartial consultant; incurred the detriment of extending the exclusive to Hilltop for another year (Ex 3)



Under Ohio law, they are clearly third party beneficiaries. This was never fully reviewed in the Trial Court. The Court made no such finding. Smith relies upon "remarks" (Smith Op. Br. 53) which are "erased" under Ogle, supra.

Smith knew Hilltop was acting as "representatives of the owners" (R. 1188, line 6, 1191, line 2), and Treiger advised that

". . . our report is basically an owner's report to guide the owner in his planning of the development of the property . . ." (R. 1190, lines 6-7)

There is a strong policy to uphold third party beneficiaries' contracts in Ohio:

Dombey, Tyler, et al. v. Detroit T.&I. R. Co.,  
351 F.2d 121, 126 (6th Cir. 1965);

Rhorbacker v. Citizens Building Ass'n Co.,  
34 N.E.2d 751, 753, 138 O.S. 273 (1941);

Visintine & Co. v. New York, Chicago & St. Louis Railroad Co.  
169 O.S. 505, 160 N.E.2d 311 (1959).

Visintine cites Restatement, Contracts, §133, to identify the different categories of third party beneficiaries: creditor, donee and incidental. In considering the scope of a "creditor beneficiary", it cited 4 Corbin on Contracts, 97, §787, and distinguished cases from outside Ohio. It upheld the third party beneficiary rights in a situation analogous to the Winslow sisters.

Ohio follows the general rule of permitting "creditor beneficiaries" to enforce contracts, 11 O.Jur.2d, 1966 Supp. 45, Contracts, §180, fn. 9, citing Visintine. See 11 O.Jur.2d, §180,

Smith also erroneously claims that its market analysis "correctly concluded that [Nutwood] was not suitable for a regional shopping center" and was sold "for its full value" (Smith Op. Br. 50).

The Court rejected both contentions. All it found was

"... has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error . . ." (R. 1469)

And, in its Final Memorandum Decision on reargument, it even deleted a phrase that had stated as to the market analysis

"... the conclusions of which were fundamentally accurate . . ." (R. 2029, lines 29-30)\*

Thus, the Court's Finding No. 9 of compensatory damages to Hilltop Realty of \$2,920 and to the Winslow sisters of \$200 is a reasonable exercise of the Court's discretion because:

"The fair market value . . . of a reliable and trustworthy market analysis was at least equal to the price which Larry Smith & Company billed Hilltop for their analysis . . ." (R. 2028-9)

Proof of Such Gross Fraud As To Justify Punitive Damages Under Ohio Law:

Finding No. 9 of Smith's Wanton and Reckless Disregard Of The Legal Rights Of Hilltop  
(supra, p. 7). [Smith's Spec. of Errors Nos. 5(b), 7]

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\* Note that, by Smith's Appendix method and its reference to the Transcript rather than the official Opinion in the Record, a significant modification is obscured, cf. R. 2029, line 30 and Smith App. 17 quoting Tr. 2779, line 4.

(Smith Op. Br. 35), and charges that the Court:

"After learning through post-trial briefs that constructive fraud would not support . . . punitive damages, . . . found . . . actual fraud because it showed 'a wanton or reckless disregard for the rights of others . . .'" (Smith Op. Br. 59)

And Smith further charges that the Court:

"After being furnished with further briefs which indicated that if 'wanton or reckless disregard' was ever a sufficient predicate in Ohio for punitive damages, that day was long past, . . . announced that the same nondisclosure constituted 'extreme and exceptional conduct' constituting a 'gross fraud' . . ."  
(Smith Op. Br. 60)

Hilltop will show there was and is no basis whatsoever for such charges. The Court considered Ohio punitive damage law more than a year before its Final Decision (Memo Dec. R. 827, 831, page 20) and told the parties "to concentrate . . . in your briefs . . . on all the evidence" (Tr. 2566, lines 10, 11, 19), including proof of "actual fraud" (Tr. 2569, line 1). Under Ogle, Id., its "remarks" are merged in the Findings of Fact. As this Court held in affirming another court's findings:

"In reaching this conclusion we have taken into consideration the fact that, in the prior hearing, and on two different occasions during the . . . present hearing, the trial judge expressed [a different] view . . . When the evidence was all in, however, the judge, as he had the right to do, changed his mind as to what the evidence proves.

"Since there was substantial evidence to support the final view, incorporated in the findings of fact, the

circumstance that it is inconsistent with preliminary views during the trial . . . is without significance.

E. V. Prentice Mach. Co. v. Associated Plywood Mills,  
252 F.2d 473, 479 (9th Cir. 1958).

Nor is Smith's personal charge supported. It filed on April 29, 1965, a 13-page brief (Paper 212)\*; the last three pages addressed to Ohio punitive damage law citing a number of the same cases that it now cites. Its Post-Trial Brief specifically incorporated this brief (Paper 260, pp. 77-8)\* and cited the same cases, including Saberton v. Greenwald, 146 Ohio 414, 66 N.E.2d 224 (1946).

First, there is no basis whatsoever for Smith's contention that, if:

" . . . 'a wanton or reckless disregard' was ever a sufficient predicate in Ohio for punitive damages, that day was long past . . . "

It is not "past". The Court quoted the latest Ohio Supreme decision, Saberton, supra, (R. 1472, lines 20-25, 2031, the 19-25).

All that later transpired was that the Court, responsive to Smith's brief filed "sua sponte", raising issues of punitive damages which the Court thought "had been decided and laid to rest long ago", permitted Smith's counsel to reargue these issues at a hearing originally set for argument solely on the factual issues re punitive damages (R. 2028).

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\* These are all available in the District Court Clerk's file.



cases alleging an Ohio "judicial trend" toward requiring "ill will or hatred" in punitive damages for fraud (R. 2032, line 23). It noted Ohio distinctions between the requisite elements for fraud as contrasted with "malicious prosecution" or "alienation of affection" (R. 2032-3).

It adhered to its prior decision, stating in part:

"The court based its conclusions on two Ohio cases, Saberton, supra, and Sears v. Holly, 178 N.E.2d 91, Ohio Ct. App. 1960." (R. 2031, lines 5-7)

It was from this Sears case, and not, as Smith asserts, from something "learned" by the Court from later briefs, that the Court, citing Sears, held the facts here also constituted:

". . . 'extreme and exceptional conduct' constituting a 'gross fraud' which was 'intentional and deliberate' . . ." (R. 2035, lines 6-20)

Thus, not only are charges suggesting the Court whittled its opinions to fit newly "learned" cases most inappropriate, but they are also wholly erroneous.

The only question on review of the Court's Finding No. 9 is whether the facts here showed such "a wanton or reckless disregard of the legal rights" of Hilltop as to justify the Court's exercise of discretion in awarding punitive damages. It would unnecessarily lengthen this brief to summarize those facts again.

This Court has recently reached an identical decision applying Hawaiian law as did the Trial Court applying Ohio law. It

In Hawaii, as in Ohio, the grounds for punitive damages are the disjunctive "or" depending on the facts and nature of case. The cited portion contains four "or" alternatives cludes:

"In such cases a reckless indifference to the right of others is equivalent to an intentional violation of them." 297 F.2d at 728.

This court cited other jurisdictions, including Ohio the following proposition:

"It is generally recognized that actions for deceit are included in those cases in which exemplary damages may be properly awarded. /47

Its supporting note 47 quotes Waters v. Novak, 94 Ohio App. 115 N.E.2d 420 (1953), which, in turn, relied on a Massachusetts case. Smith urges a contrary conclusion on the semantic of "malice" (Smith Op. Br. 63) but, the relevant heart of W is again the disjunctive, "or reckless disregard . . .":

"In this case [Waters v. Novak] seeking recovery for deceit the court submitted to the jury the question of awarding exemplary damages by an instruction stating:

"'Malice consists of bad motive or such wanton and reckless disregard of the rights of others as to show evil intent.'

"Upon appeal from a judgment including exemplary damages, the court approved that instruction; and in discussing what constituted active malice quoted from Gott v. Polsifer, 122 Mass. 235, 239, its statement that such malice

"'May consist either in direct intention to injure



another in reckless disregard of his rights and of the consequences that may result to him.'" id., n. 47.

Record: Reynolds Metal Co. v. Lampert, 316 F.2d 272 (9th Cir. 1963)

Clearly, the evidence specified above supports the Court's finding that Smith's fraudulent concealment was a reckless disregard of the rights of Hilltop Realty and the Winslow sisters.

Finding No. 10, that Smith's Fraudulent Concealment Was Authorized By Smith's New York And Eastern Division Managers Within The Scope Of Their Employment (supra, p. 7).

Smith concedes this vital finding (R. 1472-3). Smith does not note it or bracket it as a Specification of Error (Smith Op. r. 26, footnote; App. 13).

Findings Nos. 11, 12 & 13, of Calculated, Deliberate And Intentional Concealment Pursuant To Company Policy; of Inescapable Inferences That One Or More Partners Were Aware Of, And Acquiesced In, The Concealment; and that Treiger's Later Attempts To Justify And Minimize Concealment Must Have Come To The Attention Of, Or May Have Been Authorized By, One Or More Of The Partners; (supra, p. 7) [Smith's Spec. of Errors Nos. 11, 12];

Finding No. 14, that Any Of These Factors Standing Alone Supports A Finding Of Joint And Several Liability For Actual And Punitive Damages Under Ohio Law; (supra, p. 7) [Smith's Spec. of Errors No. 5b, 11]; and

Finding No. 15, of Extreme And Exceptional Conduct Which Was Intentional And Deliberate Constituting Gross Fraud Under Ohio Law (supra, p. 7) [Smith's Spec. of Error No. 5b].

If, notwithstanding Ogle, supra, the Court's "remarks" are pertinent, Finding No. 11 is the one "exception" (R. 2565, line 25)

the trial concluded (Tr. 2565-6):

"... Smith had the duty to make a full disclosure of its contemplated purchase of Severance, or at least their interest therein or to refuse the job.

"I am satisfied that this concealment was originally and throughout the entire relationship between Smith and plaintiffs calculated, deliberate and intentional as distinguished from inadvertent, accidental or misunderstanding." (Tr. 2567-8)

The Court then expressed the oral view that, as a minimum, the transaction was constructive fraud and expressed no views as to actual fraud, although it was presently of the belief that both Petti and Smith relied upon the report and that the Winslow sisters, in turn, relied upon the report (Tr. 2567-9).

The Court's finding that Smith's concealment was done in accordance with company policy "as defendants so clearly demonstrate in their Post-Trial Brief, §XIII, p. 99, et seq." (supra, 7; R. 14'), in the section that claims concealment was because of the importance of the Austin-Smith sale. This does not mitigate a calculated, deliberate and intentional scheme. On the other hand, it strengthens the finding.

Findings Nos. 12, 13, 14 and 15, are supported by the evidence and proper inferences to be drawn by the trier of the facts. They are in accord with Ohio law. Smith argues the Court's inferences are wrong and that Treiger's acts were not ratified (Smith's Brief, 39-40, 71-79).

We have described, supra, pp. 17-19, the widespread dissemination of the "reading file" which was available to everyone.

Smith's offices. It included Treiger's memorandum of his first phone call to Petti (Tr. 2592-3). Smith's Opening Brief refers to many of these interoffice memoranda in the reading file (Smith pp. 37, 39, 46). After five years of struggle to develop the new land of Severance into a regional shopping center site, it is incredible that the partners were not well aware of Hilltop's inquiry. While they, of course, deny it, this is nothing new in a fraud case. Usually there are no confessions, and it is determined by the court or jury from voluminous evidence and inferences therefrom.

One key is Treiger's participation. He joined Smith as a "statistical clerk" in Seattle in 1951. He was then a "report writer". By 1954, he went to New York as an analyst and "assistant to the senior partner . . . Larry Smith" (Tr. 1307-8; R. 1058). At the outset of the Severance project, he was an assistant to Larry Smith who was the consultant. His duty was essentially to prepare the economic analyses. Then, he succeeded Larry Smith as account man when the job became a regular retainer in 1955 (R. 1069; Tr. 1310-2). He went to Cleveland on numerous occasions for the Severance project (Tr. 1312-3). In 1957, he was advanced to Assistant Manager of the Eastern Division, which position ". . . involved direct client contact and the use of discretion in an executive position, until September 30, 1960." (R. 1058-9)

also participated with the Smith partners in a Smith affiliate, Cleveland Heights Associates, which, in turn, owned stock in another Smith affiliate which owns Severance shopping center and adjacent land (R. 1059-60).

Although Smith claims, without Record citation, that he was in charge of the Eastern Division and turned Hilltop's operations over to Treiger, "one of his Account Executives" (Smith O. 1059-60). Imus himself testified that, while another Account Executive, Steinberg, worked under Imus, Treiger "was essentially . . . independent of me, essentially from an operating standpoint" (Imus, Tr. 775).

"Q. Who was he responsible to?

"A. Primarily to Mr. Smith with respect to professional matters." (Imus, Tr. 776)

On the very same day that Treiger talked to Petti about Hilltop's "ethical conflict of interest problem", Monday, the 28th of September 1959] (Ex. 31), there was a meeting of Smith's Eastern Division attended by Larry Smith, Treiger, Imus and Kelly, to discuss the financing of Severance with Lambert (Ex. 254).

Treiger knew Kelly was aware of Hilltop's inquiry and was present at the meeting at which it was decided that it was to undertake the work for Hilltop", and he also told Orin Imus (Tr. 1819-20). But, notwithstanding the concurrent



Ex. 254), each of these executives and Larry Smith denied that he had been informed of the Hilltop inquiry. Treiger testified that he had not told Larry Smith (Tr. 1820). Imus assumed he knew of the Hilltop inquiry on September 28, 1959, but does not recall any discussion "of making a study for Hilltop of the competitive Nutwood property" (Imus, Tr. 2593).

The succeeding events have been outlined above: Treiger's pursuit of Petti; its acceptance on December 7, 1959, of a \$4,500 contract payable in installments after a 90-day projected study as completed; the intervening execution of 25-year leases with Severance by Higbee and Halle department stores on December 22/23, 1959 (R. 1207), on the basis of which Smith went forward with his purchase of Severance (R. 1189, 1190, 1197, 1203, 1225); the hasty drafting of a negative Nutwood report over the Christmas holiday period rather than the 90 days forecast (R. 1205-6, 1212); Treiger's letter of elation to Higbee of December 29, 1959, that after five years of struggle, ". . . the Severance lease is now signed -- this is fine news . . . to begin the New Year." (R. 1208); the newspaper publicity the following days which was totally silent as to any impending purchase by Smith of Severance from Austin (R. 1209-11); Treiger's telephone call, the first working day of that New Year, Monday, January 4, 1960, telling Petti of Smith's negative conclusions re Nutwood (R. 1212); Treiger's trip

associates, on January 18, 1960, and his memorandum to the

ing file (R. 1212) stating:

". . . they accepted our conclusions with respect to a negative potential for regional, intermediate or neighborhood shopping centers . . ."

and are now contemplating a recreational land use of Nutwo

"Where fraud is to be shown by circumstantial evidence such evidence is to be considered in its entirety without giving undue importance to isolated facts; although each circumstance alone may be trivial and unconvincing, the combination of all the circumstances considered together may furnish irrefragable and convincing proof of fraud."

37 C.J.S., Fraud, 436-7, §115.

The Court saw and heard the principal witnesses and is to evaluate their credibility:

"Trial courts observe the witnesses. We cannot. Our sole function is to find if there was enough evidence to pass the clearly erroneous test. We find there was."

Ogle v. United States, 362 F.2d 899, 901 (9th Cir. 1966)

Clearly, there was both direct and circumstantial evidence supporting the Court's finding of an "almost inescapable inference" that one or more of the partners was aware of the concealed transaction and acquiesced therein. The Court's findings, on all the evidence, rejected Smith's contrary assertion (R. 1473). Smith relied primarily on contrary oral evidence and "erased" post-trial remarks" of the Court; Ogle, supra. Under Ohio law, where the employer authorized the act, it is responsible in punitive damages.



Smith conceded that acts by Treiger were in the course of Smith's business in the sense of respondeat superior (Tr. 740, 2306).

There is further evidence of ratification. In August 1960, Neill and Petti asked Smith for a "full explanation" of Cleveland newspaper announcements that Smith had purchased Severance (R. 1245). As a result, Treiger prepared a memorandum "intended to serve as a basis for discussion" at a meeting in Cleveland with Petti and Neill. It also went to the reading file (R. 1246ff).

Is it credible that this "reading file" memorandum, seeking answers to Hilltop's serious charges, went unknown by the partners? The inference is clear they knew and approved its preparation and its expenses in going to Cleveland to try to placate Hilltop.

After his trip, Treiger wrote a memorandum to the reading file of the meeting which stated in part:

". . . Mr. O'Neal [sic] took the position that he was well informed of the fact that we had a consulting responsibility to the Austin Company at the time that we undertook the work for them. However, under a condition of proprietary interest, the extent of the conflict of interest, and this is the important point, was greatly expanded, and we owed them an obligation to inform them of the fact that we were submitting our report under different circumstances than existed at the time that we undertook the work. It would then have been up to them to decide whether to accept our conclusions and our findings, or to seek other guidance in the matter, although they do not question the fact that they owed us the money and would have paid us in any event.

"I do not believe that they were satisfied as a result of the meeting, and it was left on the basis that we would get in touch again." (R. 1248, line 17ff) (Empha-

report made?

Hilltop's follow-up letter of September 17, 1960 (R. 1 asking exact details of the Smith-Austin relationship went unanswered.

On October 20, 1960, Hilltop's General Counsel wrote a (Ex. 15; R. 1251) to Smith on the subject. It went unanswered.

Meanwhile, after all of these protests, Treiger, at Larry Smith's personal suggestion, was transferred to Smith's affiliate Winmar Realty, at increased compensation (Tr. 1808-9).

On November 29, 1960, although transferred from the Smith payroll, Treiger wrote two reading file memoranda with copies to New York, Chicago, Seattle, and Washington, D. C., relaying telephone calls from Larry Smith's executive secretary, Hilbert Bitz] (Tr. 190, 2382), who is also Secretary of the Smith partnership and various of its affiliates (Ex. 166). Treiger gave instructions concerning a "reanalysis" of the Nutwood market potential or opinions on the adequacy of their original study and expected that copies of the original report should go to Mississippi and to Spring, its Cleveland lawyer (Smith Op. Br. 25; R. 154).

All of these memoranda and letters had the same type :

tribution as is shown, for example, on Exhibit 58A\* (Tr. 1806, 112).

This led to the "substantiating report" dated December 15, 1960 (Ex. 10) but not tendered to Hilltop until February 15, 1961 (R. 1256). Treiger and Imus directed Steichen exactly how to prepare it (cf. Ex. 10; R. 1252-3). It was not done out of the blue, as Smith asserts, by assignment to a senior associate "who had not participated in any manner in the original study" (Smith Op. Br. 5). And, by August 1, 1960, Imus and Orndahl had become Smith partners (R. 1058). Hence, their precise knowledge became that of the partnership before the "substantiating report" was prepared or delivered.

Hilltop agrees that liability for punitive damages may be based on either authorized ratification or participation (Smith Op. Br. 75). Hilltop submits that all of the evidence warrants the inference that was "inescapable" (R. 1473).

25 C.J.S., Damages, 1966 Rev., 1158, §125(5), states:

"Slight acts of ratification are sufficient, and a principal may be liable for exemplary damages without any acts of express ratification, if the circumstances warrant the inference that he intended to assume the consequences of his agent's conduct without investigation or inquiry . . . The attempt of the principal to

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To avoid burdening the Record with repetition of Exhibits, of which textual contents are in the Pretrial Order, many Exhibits showing stamped Xeroxed distribution to Smith's many offices were not offered in evidence (Tr. 738). They were identified (Smith App. 177-84) and retained in the District Court Clerk's file under revised F.R.Civ.P. 75, and stipulated to be a "part of the Record on appeal for all purposes" (R. 2200).

justifying the agency's action in terminating my job, as shown  
ratification."

And C.J.S. repeatedly cites in its new 1966 edition, Sabert  
supra, in support. Its official syllabus, which under Ohio  
controlling, "in the light of the facts and issues"\*, provi

"3. Where an employer expressly or impliedly  
ratifies such actionable conduct of his employee,  
punitive damages may be recovered from the employer  
. . ." 66 N.E. at 224.

Its majority opinion parallels on different facts the situ  
here. The Court noted there was evidence that the commodi  
not quality merchandise"; and that "the store manager who  
[the commodity] to plaintiff was retained thereafter in th  
ment of defendant", 66 N.E.2d at 231.

Here the Court has expressly found that the original  
and the substantiating report were not "quality merchandise".  
They showed mistakes, errors and examples of unprofessional  
manship (R. 1473-4), further detailed in Hilltop's concurrent  
filed Opening Brief on Cross Appeal. But Treiger was retained  
a salary increase in spite of all this. Clearly, there was no  
fication.

22 Am.Jur.2d, Damages, 353, §259, states:

". . . slight acts of ratification will be sufficient  
to support a claim for exemplary damages against the  
employer.

". . . The fact that an employer retains an employee  
after knowledge of the latter's wilful and malicious  
conduct tends to prove ratification of the employee  
act sufficient to support a verdict against the



view that the subsequent retention or promotion of the employee guilty of the wrong is of itself sufficient evidence of ratification."

It is respectfully submitted that none of the cases cited in Smith's Brief supports any different conclusions under applicable Ohio law. They are chiefly the same cases that the Court carefully reanalyzed or involve entirely distinguishable facts.

At best, all that Smith urges is that the law of Ohio might have changed some day. But the offenses were committed in 1959-61 under Ohio law as of that date governs rather than some speculative future change in Ohio law. As was held in Hausman v. Buckley, 399 F.2d 696, 704 (2d Cir. 1962):

"In any event the proper function of this court is to ascertain what . . . [Ohio] law is, and not to speculate about what it will be, or in Learned Hand's felicitous phrase, 'to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'"

The inferences are inescapable that one or more of the 1959 partners authorized, ratified and participated in, the concealment and that they, together with the August 1960 partners, Imus and Rendahl\*, authorized Treiger's later attempts to justify and minimize the concealment. There was further ratification in retaining Treiger as an employee and, in his joint participation with Imus, by then a partner, in directing the preparation of the elaborate and gratuitous "substantiating report" in 1960-61 (Ex. 10) and, perhaps, in trying to exculpate the partnership by transferring Treiger off its payroll to a Smith affiliate at a higher



The Court carefully, clearly and concisely stated its  
sons and conclusions that, under the facts and currently ap  
Ohio law, punitive damages are proper (R. 2028-39; reprinte  
App. 15-26).

Therefore, it is respectfully submitted that Findings  
11 through 15 are abundantly supported by the evidence and  
rectly apply Ohio law.

Proof that Hilltop Was Fully Justified in Prosecuting  
This Suit, Thereby Incurring Substantial Expenses:

Findings Nos. 16, 17, 19 & 20, That The Mis-  
takes, Errors and Examples Of Unprofessional  
Workmanship In Smith's Two Reports, Together  
With The Concealed Conflict Of Interest, The  
Competitive Positions Of Severance And Nutwood,  
The Deliberately Withheld Information And Other  
Suspicious Circumstances Which Hilltop Dis-  
covered, Fully Justified The Prosecution Of  
This Lawsuit (supra, pp. 8-9) [Smith's Spec. of  
Errors Nos. 9, 10]; and

Finding No. 18, that Smith Was Obligated To  
Provide A Trustworthy Market Analysis Which Was  
Rendered Totally Unreliable And Highly Suspect  
By Its Concealed Pre-existing Conflict Of  
Interest (supra, p. 9) [Smith's Spec. of  
Errors Nos. 4, 9, 10].

Mistakes, errors and examples of unprofessional workman  
are documented in Hilltop's concurrent Opening Brief on Cross  
Appeal, Argument, Sec. C. Smith's concealed conflict of inter  
is admitted (R. 1248, ¶317). The competitive positions  
Severance and Nutwood is admitted (supra, pp. 17-18, 23).  
Introduction to the Nutwood report (Ex. 175, 3 bottom page)

ely withheld (supra, p. 26). Other suspicious circumstances  
re briefed under Intent to Deceive (supra, 20-27).

Smith argues that, since a partial disclosure was made  
long after Hilltop had sold Nutwood in reliance on Smith's  
negative report) that, nevertheless, when Smith delivered its  
substantiating report" of February 15, 1961, Hilltop should  
have abandoned its causes of action for fraud, breach of con-  
tract, and antitrust violations (Smith Op. Br. 70).

It asserts that the Court's finding of "deliberately with-  
held information" (R. 2030) referred only to the Smith-Austin  
agreement. Smith cites only "colloquy between the court and  
ounsel" (Smith Op. Br. 66). But its citation of R. 2123-5  
does not support its contention:

"MR. STEPHAN: . . . But what was disclosed to  
Mr. O'Neill at that time was just that the thing had  
been accomplished on February 10, 1960. . . .  
What else did we learn? We learned everything that  
we could . . . through the hostile lips of adverse  
witnesses, and here is one thing we learned, Exhibit  
175. . . . says on its caption in the handwriting  
of the defendants, 'None of this used in the report  
to the client' [Hilltop] . . .

"THE COURT: Yes, this is coming back to me . . ."  
(R. 2124-5)

Smith's other citation (Smith Op. Br. 66) refers again to  
lloquy of what was withheld (R. 2132-4). Hilltop pointed out  
at its Interrogatories asked for "work papers" and did not  
t them; that its charge was against Smith in withholding the

"MR. STEPHAN: . . . We charge the defendants with willfully withholding the essential ingredient that would have changed this picture 180 degrees."

Thus, the Court's finding of withheld information was many factors discussed above. First, that Smith was buying competitive property while purporting to give an objective report on a competing property, Nutwood; Second, that Smith knew, as a market analyst, that the site on which he was asked to make such a report was in the very trade area of Severa. Third, that the report was not scientific but one in which judgment could vary widely; Fourth, that other nationally recognized consultants were available; Fifth, that such an objective and favorable report would be a valuable and virtually essential prerequisite to attracting department store tenants; Sixth, that its concealment continued during nearly a 4-month interval between Treiger's negative telephone advice to Petti on January 4, 1960 (R. 1212) and the sale of Nutwood on April 29, 1960 (R. 1238), notwithstanding an exchange of letters in May 1960 in which Treiger said he expected to call on Petti when he was in Cleveland (Exs. 47, 48), and Treiger's professed "involvement in the outcome of the analysis" (Ex. 48).

Clearly, this Court's finding, that the expensive litigation might have been avoided, referred to Smith's successive opportunities to disclose to Hilltop its impending purchase of Nutwood before undertaking the Nutwood market analysis, or before

...considering the report, or on February 18, 1960, when the Smith-  
Justin agreement was consummated (cf. Smith Op.Br. 39), or even  
when acknowledging Hilltop's payment of its bill in full (supra,  
R. 34) on March 22, 1960; or, if post-trial remarks are admis-  
sible, as the Court said:

"Smith had the duty to make a full disclosure of  
its contemplated purchase of Severance, or at least  
their interest therein, or to refuse the job."  
(Tr. 2567)

Any of these would have entirely altered Hilltop's reliance on  
Smith and its report in selling Nutwood for residential purposes,  
on April 29, 1960, at \$3,500 per acre.

Hilltop presented substantial evidence that, had an objec-  
tive report been made, Nutwood could have been sold as a region-  
al shopping center site for at least \$17,500 per acre. The  
Court rejected it only on legal grounds (R. 1470). Assuming  
that Hilltop failed to sustain a legal burden of proof, from  
which Hilltop cross-appeals, such a legal conclusion does not  
mean Hilltop could not successfully have attracted one or more  
of the several other remaining available department stores as  
tenants had an objective study, in this judgment area, by other  
reputable market analysts been made. Thus, Smith itself, dur-  
ing a 5-year period of efforts to commit Higbee and Halle,  
reported other stores were interested in locating branches in  
the eastern Cleveland suburbs: In 1958, Montgomery Ward con-  
sidered a 160-180,000 sq. ft. store (R. 1143, 1133-4); and



Sterling-Lindner-Davis (R. 1118) and Sears, Roebuck (R. 1119) showed like interest. As late as 1959, The May Co. was the only department store rival to other eastern Cleveland stores (R. 1066-7, 1158).

Smith next claims that expenses reflect, in part, defense of "baseless monopoly claims" or "specious state and federal antitrust claims" (Smith Op.Br. 39, 70).

The summary dismissal without trial is briefed in Hilltop's Brief on Cross Appeal, pages 1-29. But, in evaluating Smith's assertions, this Court should know of two prior Memorandum Decisions on antitrust which Smith ignores. After briefs and oral argument, the Court, on May 13, 1963, upheld the antitrust charges of the original Complaint without prejudice to their being again raised after entry of a Pretrial Order (R. 21-24). Hilltop's counsel would have been derelict indeed to its duty if it failed to expend good faith discovery efforts on these issues. More than 18 months later, after much discovery efforts by all parties, the Court, on December 14, 1964, ordered further discovery and ordered Hilltop to file a detailed precise statement of its factual contentions (R. 530-2).

On March 29, 1965, the Court rendered a second Decision (R. 827-35, at 829-31)\* which reversed its prior Decision.

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\*Attached as Appendices A and B respectively to Hilltop's Opening Brief on Cross Appeal.



cepted as true the contentions and all reasonable inferences,  
ut, upon reconsideration, held they did not constitute anti-trust violations.

Hilltop's Cross Appeal alleges error of law in this ruling. But the point is that pretrial discovery efforts from the filing of the Complaint up to the time of the Court's reversal of its earlier holding on March 29, 1965, is in accord with the Court's Finding No. 20 that all of the circumstances, including the competitive positions of Nutwood and Severance":

" . . . fully justified the prosecution of the fraud and contract counts . . . [and] also . . . the anti-trust counts up to a point which the court need not determine . . . " (R. 2030, lines 3, 6-8, cf. 2049-50)

Finding No. 18 (supra, p. 56) is separately listed only because Smith's Specification of Errors No. 4, as well as its Nos. 9 and 10, challenge this finding (Smith. App. 17).

Hilltop submits that Finding No. 18, that Smith was obligated to provide a reliable and trustworthy market analysis, which was rendered totally unreliable and highly suspect by the subsequent discovery of Smith's tortiously concealed pre-existing conflict of interest is self-evident from the foregoing facts and argument.

It is respectfully submitted that the evidence as to Findings Nos. 16 through 20 abundantly supports the Court's findings and conclusions that Hilltop was fully justified in prosecuting this lawsuit, thereby incurring substantial expenses.

And Punitive Damages, And Attorneys' Fees, Was  
Within The Court's Discretion:

Finding No. 21, that Hilltop And The Winslow Sisters Shall Each Recover Compensatory and Punitive Damages; And Jointly A Reasonable Attorneys' fee (supra, p. 9). [Smith's Spec. of Errors Nos. 2, 3, 5, 6, 8, 10].

The Court, in the first of its two final Memorandum sions, indicated its modest criterion of punitive damages

"The court therefore proposes to fix punitive damage, and he has in mind, as a minimum, such amount as will reimburse plaintiffs expenses in the prosecution of this action and also the possible award of an attorney's fee as is authorized by the law of Ohio . . . (R. 1474)

Hilltop and the Winslow sisters complied with the Court's direction (R. 1487-9) to file detailed schedules of their out-of-pocket expenses (R. 1498ff). They had contributed each to a joint litigation expense fund account (R. 1498, 181), in which out-of-pocket expenses totaling \$72,406.42 (R. 1498, 2015) had accrued through May 1966 (R. 2025). Hilltop contributed some 3,461 of uncompensated management hours (R. 1498, 2015) plus countless unrecorded hours by clerical personnel (R. 1498, 2015).

The Court's award of \$40,000 punitive damages to Hilltop (R. 2038) was only \$4,000 over its one-half share of the \$72,406.42 actual out-of-pocket expenses paid through June 1966 (R. 2025). At the most, this would only reflect uncompensated managerial and clerical time at scarcely \$1.00 per hour. It awarded \$35,000 to the Winslow sisters which was over \$1,000 less than their one-half share of actual

Cleveland and Seattle counsel complied with its direction (R. 1489) and filed their time records and rescinded their contingent fee agreement (R. 1500, 1908). It itemized over 7,638 hours on this case through November 24, 1965 (R. 1500).<sup>\*</sup> Its "waiver of costs" (R. 2136-7) now objected to (Smith Op. Br. 9) was to avoid any duplication of "costs" such as filing, service and witness fees, bonds, etc. billed to and paid by Hilltop as litigation "expenses" (e.g., R. 1764, 1779, 1800).

The Court's award of \$75,000 attorneys' fee was about \$10.00 per hour for the time spent on all four counts of the complaint and only slightly in excess of that based upon estimates which excluded time devoted solely to antitrust (R. 1500). This is less than one-third of agreed normal time charges (R. 920).

The Court found that counsel on both sides were competent and thorough; that the case had been well tried and all counsel had given their respective clients the benefit of every reasonable argument and shred of evidence by expending diligent efforts (R. 1469, lines 17-19, 26-31). If its post-trial "remarks" are appropriately considered, the Court stated:

" . . . [T]his is one of the most thorough and best investigated cases that has come before me."  
(Tr. 2566)

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<sup>\*</sup> Pursuant to the earlier instruction of the Court, supra, 700 hours were estimated as antitrust (R. 1500).

its conclusion that \$75,000 was a reasonable attorneys' fee supported by the evidence and is a conscientious exercise of the Court's discretion. The Court noted it

" . . . will not adequately compensate plaintiffs' counsel for all of the time they have devoted to this case but the court believes, considering all the circumstances, that such an amount is reasonable." (R. 2038, lines 24-30)

Smith's remaining objection is that it violates an Ohio "ratio rule" (Smith Op. Br. 65) citing only Richard Hunter, 161 Ohio St. 185, 85 N.E.2d 109, 112 (1949). Its issue was not a "ratio rule" but whether a jury's verdict reporting "compensatory damages" as "none" and "punitive damages" as \$200 should be affirmed. The court quoted with approval from 15 Am.Jur. 707, §271, that punitive damages may be recovered though actual damages are "nominal", but the verdict of compensatory damages was not even "nominal"; it was "none". Richard cited various other cases, including a parallel West Virginia case where the jury's verdict for compensatory damages was "blank" and for exemplary damages, \$1,000. Smith's quotation from this West Virginia case (Smith Op. Br. 65) that punitive damages must bear a reasonable ratio to compensatory damages was dictum, both in Ohio and West Virginia. The following sentence held:

"In the absence of an award of compensatory damages an award of punitive damages may be taken as an indication that the jury was actuated by passion, prejudice and improper motives in making such finding." 85 N.E.2d at 112.



In State v. Cameron, 91 Ohio St. 50, 109 N.E. 584, 586 (1914), the Ohio Supreme Court said:

" . . . In our own state today there is no limit on the punitive damages a jury may award, in addition to just recompense for personal wrongs involving the elements of fraud . . . "

In Saberton v. Greenwald, supra, the Ohio majority specifically rejected a "ratio rule". The dissenting opinion specifically pointed out:

"In this case the plaintiffs recovered full compensatory damages in the sum of \$38.15. . . . We are now remanding . . . to submit to another jury the question of punitive damages and to advise it that plaintiff may recover such damages as it deems proper, not however in excess of a sum of \$5,000 . . . prayed for in the petition which is more than 128 times the amount of the actual damages suffered."

This Court had considered analogous situations. Davenport v. Mutual Benefit Health & Accident Association, 325 F.2d 785 (1963), involved a claim of \$10,000 for actual damages and \$100,000 for punitive damages. Appeal was from dismissal for lack of a jurisdictional amount under diversity. This Court reversed. It reviewed Oregon punitive damage precedents, including one affirming \$250 of actual damages and \$2,750 of punitive damages, 325 F.2d at 789, n.2; and Bell v. Preferred Life Society, 320 U.S. 238, 241-3, 64 Sup.Ct. 5, 6-7, 88 L.ed. 15 (1943), which reviewed Alabama and South Carolina precedents, including one affirming a verdict of \$11.70 actual and \$1,211.70 punitive, 320 U.S. at 241, n.5. The Supreme Court



"But neither in these cases, nor in any others cited to us, has that court held that punitive and actual damages must bear a definite mathematical relationship." 320 U.S. at 242.

At the most, as stated in the 1966 edition of 25 C.J. Damages, 1164-5, §126(1), there is no ratio rule but only of reasonableness under all the circumstances.

It is respectfully submitted that, under all of the circumstances, the Court's findings that its allowance to Hill and the Winslow sisters of scarcely their out-of-pocket expense and to their attorneys, as part of compensatory damages under Ohio law in such a case, 25 O.Jur.2d, Fraud and Deceit, 3, a fee which, based on hours spent, was less than one-third of normal time charges (cf. R. 920), was a judicial exercise of discretion and should be affirmed.

Proof That the Court's Conclusion to Apply Ohio Punitive Damage Law is Correct:

Finding No. 22, of The Proper Application of Ohio Punitive Damage Law to Washington Defendants Who Voluntarily Ventured Into Ohio To Commit Their Misdeeds (supra, p. 10).  
[Smith's Spec. of Errors No. 5(a)].

Smith's Brief and Appendix omit any reference to the Court's Memorandum Decision of May 25, 1965 (R. 1021-3), attached hereto as Appendix A. It fully analyzes this issue.

Restatement, Conflict of Laws, §612, states the basic rule:

contrary to the strong public policy of the forum."

the controlling word is "strong". Richardson v. Pacific Power  
Light Co., 11 Wn.2d 288, 118 P.2d 985 (1941), is in accord:

"It is the universal rule that the existence and nature of a cause of action for tort are governed by the law of the place where the alleged wrong was committed . . . (id. 299)

"There is an exception . . . that a foreign cause of action will not be enforced where to allow suit thereon would be contrary to the strong public policy of the state in which enforcement is sought."  
(id. 300)

in defining "strong public policy", the court continued:

". . . the public policy of a state is to be found in its constitution, its statutes, and the settled rules laid down by its courts . . . (id. 300)

" . . . there is a strong public policy in every jurisdiction 'in favor of recognizing and enforcing rights and duties validly created by a foreign law,' and consequently the invocation of the public policy of the forum as a bar to the enforcement of foreign rights of action should be very narrowly limited, especially as between the states of the United States, where serious differences are not likely to be found . . . [citing authorities and cases]." (id. 302)

It then quoted with approval from Herrick v. Minneapolis & St.L.  
Co., 31 Minn. 11, 16 N.W. 413 (1883):

"' . . . To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens.'" (id. 302)

and continued:

"We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." (id. 303-4)

Carstens Packing Co. v. So. Pac. Co., 58 Wash. 239, Pac. 613 (1910), and Farley v. Fair, 144 Wash. 101, 256 Pac. 1031 (1927), cited (Smith Op. Br. 56), are not contra. involve actions which had important, if not controlling, contacts with Washington's contrary statutory policy. This distinction is noted in Hatcher v. Idaho Gold & Ruby Mining Co., 106 Wash. 108, 112-5, 179 Pac. 106 (1919), when the parties "voluntarily" went to Idaho, just as here Smith "voluntarily ventured into" Ohio (R. 1022).

In Building Service Employees International Union v. Gazzam, 339 U.S. 532, 537-8, 70 S.Ct. 784, 94 L.ed 1046 (1962) the court held:

"The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the State.'"

Nothing in Washington's constitution or statutes prohibits exemplary damages. On the contrary, the Court's Memorandum

Washington statutes authorizing exemplary damages enacted over the years. The latest is a 1961 Consumer Protection Act, in tort field closely related to that covered by this lawsuit (RCW 19.86.090). Washington courts also enforce Federal treble damage statutes. Walker v. Gilman, 25 Wn.2d 557, 576, 171 P.2d 97 (1946). We agree that public policy

" . . . does not depend exclusively upon legislation, but may be the result of judicial construction and announcement." (Emphases added.)

Griffin v. McCoach, 123 F.2d 550, 551 (5th Cir. 1941).

In Seattle Crockery Co. v. Haley, 6 Wash. 302, 313, 33 Pac.

50 (1893), the court indicated it would follow the "rules" of sister states:

"This court in Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45 (25 Pac. Rep. 1072), did not undertake to say that, where the statute expressly provided for them, punitive damages could not be recovered. In such cases, the rules laid down in those jurisdictions where the doctrine of punitive damages is accepted should guide the courts and juries of this state." (Emphasis added.)

It is submitted that the Court's choice of the word "rules" includes constitutional, statutory and judicial rules of punitive damages in sister states. The Trial Court's Memorandum Decision (R. 1021-3; App. A) is in accord with an increasing trend to uphold foreign based rights. Thus, in Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 203 N.E.2d 210, 212 (1964),

In addition, there are other examples, e.g., RCW 7.12.080, wrong-  
ful attachment; RCW 79.40.030, cutting timber on state land, etc.



where New York forbids enforcement of gambling debts, the nevertheless held as to a Puerto Rican debt which is valid that territory:

"Since these gambling contracts were [valid] . . . absent a clear showing that the enforcement . . . would 'offend[s] our sense of justice or menace[s] the public welfare' . . . we may not withhold aid. We do not think that public policy forbids us to enforce these contracts.

"Substantially all of the commentators agree that foreign-based rights should be enforced unless the judicial enforcement of such a contract would be the approval of such a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."

Smyth Sales v. Petroleum Heat & Power Co., 128 F.2d 9 (3rd Cir. 1942), is much like this case. It allowed exemplary damages for fraud which took place in a sister state which recognizes exemplary damages because the forum state permits them in conflict situations. Here, as the Court found, this likewise allows punitive damages for fraud.

The question is not the Washington common law judicial rule of exemplary damages on actions arising here, but whether the trial court's conclusion that enforcement in Washington of the common law judicial rule of Ohio for actual fraud is proper. The Court correctly applied the rule and not the exception. Restatement, Conflict of Laws, §421, that:

"The right to exemplary damages is determined by the law of the place of wrong." (R. 1021)



5 F.2d 647, 654 (9th Cir. 1956), this Court stated:

"[T]his Court defers to the interpretation of the able trial judge, himself a lawyer of the state of long standing, acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state. . . ."

cord: Homolla v. Gluck, 248 F.2d 731, 733 (8th Cir. 1957),

at an appellate court consistently declines

" . . . to attempt to outpredict, outforecast or outguess a trial judge with respect to a doubtful question of the law of his state."

Thus, the Trial Court's conclusions should be affirmed

at there is no "strong public policy" precluding a Washington

court from enforcing the Ohio exemplary damage rule since the

fraud was committed in Ohio (R. 1021-3; App. A).

#### CONCLUSION

It was cheaper for Smith to run the risk of litigation for his fraudulent concealment and false report than to endanger its pending \$4,000,000 stake in Severance by permitting Hilltop's development of Nutwood as a potential competing property which would again throw Severance "off balance" (Ex. 313, p. 2).

In this respect this case is comparable to Funk v. Kerbaugh, 22 Pa. 18, 70 Atl. 953 (1908), where defendant wilfully blasted plaintiff's building

" . . . because it was cheaper to pay damages . . . than to do the work in a different way." 222 Pa. at 19, 70 Atl. at 954.

Hilltop respectfully submits that, under F.R.Civ. P. 11, the Court's findings of fraud and its conclusions awarding limited compensatory and punitive damages, and attorneys' fees should be affirmed, and accordingly that Smith's appeal should be dismissed;\* and that Hilltop be awarded its costs and disbursements herein.

DATED at Seattle, Washington, December 9, 1966.

*Albert E. Stephan*

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\*Hilltop contends in its Opening Brief on Cross Appeal that upon review of the evidence and applicable law, this Court will reach the "definite and firm conviction that a mistake has been committed", United States v. United States Gypsum Co., 333 U.S. 364; 68 S.Ct. 525; 92 L.ed. 746 (1948); because of the trial court's summary dismissal without jury trial of the antitrust counts on erroneous views of current law; and because of the denial of substantial compensatory damages under the contract and fraud counts against a fiduciary.

I CERTIFY that, in connection with the preparation of this  
brief, I have examined Rules 18, 19 and 39, of the United States  
Court of Appeals for the Ninth Circuit, and that, in my opinion,  
the foregoing brief is in full compliance with those rules.

By Albert E. Stephan  
Albert E. Stephan of  
Attorneys for Appellees  
HILLTOP REALTY, INC., et al.

#### PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on December 9,  
1966, I caused three copies each of the foregoing document to be  
served on Helsell, Paul, Fetterman, Todd & Hokanson, attention  
Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washington  
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et al., and on Bogle, Gates, Dobrin, Wakefield & Long, attention of  
Robert W. Graham, Esq., and Ronald E. McKinstry, Esq., 14th Floor,  
Cotton Building, Seattle, Washington 98104, counsel for The  
Martin Company, by having my secretary mail the same to them at  
the addresses in duly addressed envelopes with First Class post-  
age prepaid, and that said addresses are their last known addresses,  
and that said attorneys are all of counsel of record for appel-  
lants.

By Albert E. Stephan



## APPENDIX





RECORDING DECISION OF MAY 23, 1985  
RE APPLICABILITY OF PUNITIVE DAMAGES  
Under Washington Law [R.1021-3].

[R.1021] Plaintiffs have included in their prayer for relief a claim for exemplary damages as allowed by the law of Ohio where the alleged tortious conduct of defendants took place. The defendants agree that Ohio law permits punitive damages in certain circumstances, but contend that the Washington courts, whose lead this court must follow in this diversity action, because of a strong state policy against punitive or exemplary damages, would decline to apply Ohio law in this respect. Plaintiffs, of course, disagree.

Both parties rely on the same section, §421, of the Restatement, Conflict of Laws. Plaintiffs rely on the rule: "The right to exemplary damages is determined by the law of the place of wrong." Defendants rely on the exception:

Comment a. When damages regarded as penal.\* In those states where exemplary damages are never allowed, such damages may be refused in an action on a foreign wrong, whatever the law of the place of wrong, on the ground that they are penal. . ." The rule is also found in 11 Am. Jur., Conflict of Laws, §185, and is applied in O'Reilly v. Curtis Publishing Co., 31 F. Supp. 365 (D. Mass. 1940).

There can be little doubt that in the case at bar the rule must be applied rather than the exception. First,

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\*emphasis in text.

strong public policy of the State of Washington, and secondly, Ohio law allowing exemplary damages is not a penal law within the sense intended by the general conflict of laws rule that the courts of one state will not enforce the penal laws of another.

Richardson v. Pacific Power & Light Co., 11 Wn.2d 211

holds that the courts of Washington will refuse to apply the law of a sister state if such law contravenes a strong\* public policy of the State of Washington. This court is at a loss to see how there is any contravention of Washington policy if a Federal court allows exemplary damages under Ohio law to an Ohio resident for an alleged willful tort committed by a Washington resident who voluntarily ventured into the State of Ohio to perform his misdeed. Furthermore, Washington is not one of those states that use the Restatement language, "where exemplary damages are not allowed," since by statute extra-compensatory damages are recoverable for trespassing swine, RCW 16.12.020; faulty grain mill, RCW 19.44.050; unlawful detainer, 59.12.170; waste by a landlord or tenant, RCW 64.12.020; timber trespass, RCW 64.12.030; a carrier's failure to redeem a ticket, RCW 81.56.160; and restraint of trade, RCW 19.86.090. In light of these statutes, it can hardly be said that Washington has a strong\* policy against exemplary damages.

Secondly, the argument misconceives the meaning of the word "penal" as used in the field of conflict of laws.

\*Emphasis in Opinion.

ense, is whether the wrong sought to be redressed is a wrong  
to the public or a wrong to the individual . . ." Huntington  
Attrill, 146 U.S. 656, 668, 36 L.Ed. 1123, 1128 (1892). See  
also Atchison T. & S. Ry. v. Nichols, 264 U.S. 348, 68 L.Ed.  
20 (1924); Daury v. Ferraro, [R. 1023] 108 Conn. 386, 143 Atl.  
30 (1928). On the facts of this case there is no public wrong  
which is sought to be redressed and the exception to the rule  
upon which defendants rely is inapplicable.

Accordingly, the plaintiffs are not foreclosed from con-  
tending that punitive or exemplary damages should be awarded  
under the laws of Ohio.

Dated this 25th day of May, 1965.

(s) W. T. BEEKS  
United States District Judge [R. 1023]





No. 21207

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United States Court of Appeals  
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vs.

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*Additional Cross-Appellee as to Count No. 4 only.*

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REPLY BRIEF OF LARRY P. SMITH, ET AL., AS  
APPELLANTS

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I. INTRODUCTION

Hilltop dresses the issues raised by our appeal in the raiment of factual questions, invulnerable on appeal unless "clearly erroneous" under F. R. C. P. 2(a). But none of the errors we specify involves a finding based on disputed facts. The trial judge recognized this when, upon presentation of final judgment, he observed that an appeal by Smith "would involve purely questions of law," whereas an appeal by Hilltop "would involve questions of fact" (R. 2165, see also R. 2175).

Because the trial judge adopted two written decisions as his only formal findings of fact and conclusions of law (R. 2150), the findings and conclusions are not separately labelled as such. The portions of the decisions to which we have assigned error are either conclusions of law, which, as we pointed out in our opening brief, are contrary to the court's own factual findings (See e.g., Op. Br. 30, 32, 40, 51, 54, 59), or are factual findings which are contrary to the undisputed evidence and, on most crucial points, the admissions of Hilltop (See e.g., Op. Br. 15-21, 31, 38-40, 66-69, 71-79).

Plainly, this court is not bound to respect conclusions which cannot be reconciled with the district court's evidentiary findings. *Bullen v. DeBretteville*, 239 F.2d 824, 835 (9th Cir. 1956), 5 Moore's Fed. Prac. (2nd Ed. 1966) 2630-31, § 52.03, or findings which cannot be reconciled with the uncontradicted testimony, documentary evidence and admitted facts. 5 Moore's Fed. Prac. (2nd Ed. 1966) 2637, § 52.04.

In its brief, Hilltop purports to sustain 22 "Findings" made by the court below. But crucial factual findings which, ironically, Hilltop assigns as error on its own appeal (Hilltop Op. Br. 17-18), conflict with the "findings" Hilltop discusses. Thus, time and again Hilltop affects the stance of winner on vital issues which it lost below and about which it complains on its cross appeal. Chief of these are the court's findings that Smith fully performed its contract with Hilltop (M.D., App. 17)\*; that Smith was not actuated by malice or any motive to prefer Severance over Nutwood (See Op. Br. 4, R. 2077, M.D. App. 17-18); that Hilltop failed to prove that the Smith report was wrong (M.D., App. 10; see R. 2143, R. 2089), or that Nutwood had potential as a shopping center site (M.D., App. 10, see O.O., App. 5-6), or that Nutwood was worth more than the \$3,500 an acre paid by Ridge Hills, or that Hilltop or the

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\*References herein to the various parts to the appendix filed with our opening brief are the same as in that brief. See p. 2 of that brief, cited herein as "Op. Br." Hilltop's answering brief is cited, "Ans. Br."



sisters were damaged by the sale to Ridge Hills (M.D., App. 10).

We shall comment on Hilltop's 22 "findings" in the order in which they appear in Hilltop's answering brief. Before doing that we shall reply to Hilltop's attempt to shift the burden of proof to Smith on the ground that Smith\*\* was a fiduciary.

## II. BURDEN OF PROOF

There are several complete answers to Hilltop's "burden of proof" argument (Ans. Br. 14). First, even if the relationship be deemed a fiduciary one, the burden of proof would not shift. For example, in *Anderson v. General Motors*, 161 F. Supp. 668 (W.D. Wash. 1958), aff'd. 275 F.2d 63 (9th Cir. 1960), the court, applying Washington law, held that every element of fraud had to be proven by clear, cogent and convincing evidence, despite the fact that plaintiff had based his claim upon an allegation of a "relationship of trust and confidence, which required disclosure." 161 F. Supp. at 676. See *In re Smith's Estate*, 68 Wn. Dec.2d 127, 136, 411 P.2d 879, 384 (1966). Second, there is no issue as to which, from a practical standpoint, the burden of proof would make any difference. Even if it were Smith's burden to show that it had no ulterior motive, it carried that burden completely. The court observed as to its finding that Smith had no ulterior motive, "there is no question about that" (O.O., App. 15). The court also found affirmatively that "Smith fully performed its contract . . ." (M.D., App. 17). It was only as to such matters as whether Hilltop was a potential shopping center site and whether it was worth more than \$3,500 an acre that there was a failure of proof. As to these matters, Hilltop unambiguously had the burden of proof, which it failed to meet. Finally, it is doubtful at best that Smith was a fiduciary in the technical sense of the word. The

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\*Herein, as in the opening brief, "Smith" refers to Larry Smith & Co. When reference is made to Larry Smith, the individual, he is clearly identified. Larry Smith died January 25, 1967.

court found only that, "by the very nature of the relationship between the parties," Hilltop had a right to rely on the absence of a potential investment by Smith in Severance (M.D., App. 21). As the Washington court recently observed in *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157, 160 (1966), "A simple reposing of trust and confidence in the integrity of another does not alone make of the latter a fiduciary."

### **III. REVIEW OF HILLTOP'S "FINDINGS" SHOWS THEY ARE EITHER CONCLUSIONS DRAWN FROM INCOMPATIBLE FACTUAL FINDINGS OR ARE CONTRARY TO THE RECORD**

#### **Finding No. 1 (Ans. Br. 5, 17)**

It is admitted that Hilltop was not informed of Smith's pending negotiations on Severance.

#### **Finding No. 2 (Ans. Br. 5, 17-20)**

Here Hilltop indulges in a wide-ranging argument which has little to do with the issue of materiality. We asserted that unless Hilltop would have acted differently, had it known of Smith's potential investment in Severance, the non-disclosure of the facts was not material (Op. Br. 30-31, 45-46). Hilltop's principal counter is that Petti's understanding of the competitive positions of Severance and Nutwood is unimportant (Ans. Br. 19-20). But Petti's belief and understanding is controlling. He was the actor for Hilltop. Since he considered Severance and Nutwood to be non-competitive (Tr., App. 96-99), a belief he conveyed to Treiger (A.F., App. 44), and since he knew Smith was a consultant on Severance (A.F., App. 44, 48), it is unreasonable to think that knowledge of Smith's negotiations would have influenced him in hiring Smith. Fraud cannot be based upon nondisclosure unless the facts concealed are material. *Schubert v. Neyer*, 12 Ohio Op.2d 231, 165 N.E.2d 226 (App., 1959).

**Finding No. 3 (Ans. Br. 5, 20)**

Again, this finding is not controverted.

**Finding No. 4 (Ans. Br. 5, 20-27)**

Hilltop misses our point. The element of intent to deceive under Ohio law "imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will. . . ." *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962) quoted at Op. Br. 43. The trial judge absolved Smith of having any dishonest purpose or ulterior motive. Compare *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 416, 3 N.E.2d 895, 907 (1937), from which the Ohio Supreme Court in *Slater* adopted its definition of "bad faith."

Hilltop would erase the court's expressions on this point by citing *Ogle v. United States*, 362 F.2d 899 (9th Cir. 1966). But all that *Ogle* says is that a trial court's remarks during a trial are erased by inconsistent formal findings. The trial judge's statements cited by us are entirely consistent with the court's formal findings. The statements were made by the district judge not during the trial but as part of a tentative decision after trial (O.O., App. 2, 8) and during an oral argument six months *after* he had entered his principal formal findings (O.O., App. 15). It is perfectly proper to consider such decisions or remarks where they are consistent with the formal findings and serve to illuminate or supplement the formal findings. *Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966).

Finally, the court found at least inferentially in its formal findings that Smith's motive of non-disclosure was to respect the confidence of Austin. The court found the concealment "was done pursuant to company policy, as defendants so clearly demonstrate in their posttrial brief (Sec. XIII, pp. 99, et seq.)" (M.D., App. 13). Section XIII of our posttrial brief, which the court found so convincing, was entitled,

"Smith's non-disclosure of its negotiations with Austin was pursuant to its antecedent obligation to Austin." This section of our brief was in direct response to the court's request that the issue of Smith's motivation be thoroughly briefed because, "it is hard for me at this moment to see a motive of pecuniary gain" (O.O., App. 9). As demonstrated by the judge's further remarks after the posttrial briefs were submitted and his written opinion had been filed, the judge always held to the opinion that the non-disclosure was "in connection with Austin Company's good will, there is no question about that, to retain that . . . that has been my feeling all along on that particular phase of it" (O.O., App. 15).

Small wonder that Hilltop wants to "erase" the court's firm conviction, expressed in differing terms at least six times (M.D., App. 13, 17-18, R. 2077, O.O., App. 2, 8-9, 15). Hilltop's extended argument (Ans. Br. 20-27) is a shortened version of the argument it presented in its posttrial brief to try to convince the trial judge that Smith had an ulterior motive or dishonest purpose. (See remark of Hilltop's counsel quoted at O.O., App. 15). The trial judge rejected all of these arguments. Far from being subject to erasure or being "clearly erroneous," his findings, repeatedly expressed, were clearly correct.

### **Findings No. 5 and 6 (Ans. Br. 6, 27-36)**

Hilltop confuses two distinct findings of reliance: one Hilltop's reliance on the conclusions of the report (M.D., App. 10) and the other Hilltop's reliance on its understanding of Smith's relationship to Severance (M.D., App. 12). We have assigned as clear error the court's finding that Hilltop relied on the conclusions of the report (Op. Br. 15-24, 31) and have dealt with the other finding under the issues of both materiality and reliance (Op. Br. 30-32). The "reliance" which the district judge found to be an element of fraud was reliance on a belief as to Smith's relation to Severance (M.D., App. 11-12).

The court could not and did not find that Hilltop



was damaged by its reliance on the conclusions of the report, since the court was not "persuaded that the conclusions reached in the Nutwood analysis were wrong" (M.D., App. 10). Reliance on Smith's relationship to Severance could not possibly damage Hilltop, unless the product which Smith turned out caused damage. Obviously, one seeking damages based upon an allegation of fraud must prove both reliance and damage. *Block v. Block*, 165 Ohio St. 365, 135 N.E.2d 857 (1956).

Under the heading "reliance," Hilltop argues many relevancies. We restrain our temptation to answer point for point, and limit ourselves instead to three glaring examples. Just what, for example, Larry Smith's membership in a professional society has to do with reliance we fail to see (Ans. Br. 31). Neither could the trial judge (Tr. 542). Just what, for a second example, the doctrine of *res gestae* has to do with reliance, we likewise cannot understand (Ans. Br. 32-36). And just how, for one more example, the reference to Vincent Aveni's testimony on page 35 affects reliance by anyone we are unable even to guess. Aveni merely relied on Petti, who was president of Hilltop (Tr. 535-36).

#### **finding No. 7 (Ans. Br. 6, 36-38)**

We do not question the court's finding that Hilltop had a right to rely on the Nutwood analysis. Our point is that Hilltop admits that it did not so rely (Op. Br. 15-21, 31, 46-49). As to Hilltop's right to rely on Smith's statements of its connection with Severance, our position is that reliance or non-reliance has no practical significance, in the absence of further findings that Hilltop relied on the Nutwood analysis *and* the analysis was incorrect (Op. Br. 36-49).

We have no quarrel with the general legal propositions cited by Hilltop (Ans. Br. 36-38). However, Hilltop's lone factual statement that, "At best all Smith ever told Hilltop or O'Neill were gross half-



truths relating to its 'pre-existing consulting relationship' with Severance" (Ans. Br. 37) is itself at best a gross half-truth. Tom Crume, secretary of Hilltop, admitted that Treiger told Hilltop and O'Neill on October 8, 1959, at their first meeting, that Smith was still acting as consultant on Severance (Tr. 480-81, see A.F., App. 44, 48).

### **Finding No. 8 (Ans. Br. 38-40)**

It is patent that Hilltop sustained no damage, either from its alleged reliance on the report or from its alleged reliance on the nondisclosure. It failed to show that Nutwood was valuable as a regional shopping center site or that it was worth more than the price for which it was sold (M.D., App. 10). Hilltop's efforts for years on behalf of Ridge Hills to promote Nutwood for shopping center purposes is eloquent evidence of the unsuitability of the site for that purpose (See Table, App. 173-76). Hilltop showed no damage in hiring Smith or in paying for the report, and in fact never pleaded any such damage. The court found damage, but only by concluding that a report, the conclusions of which were not proved wrong (M.D., App. 10), and which contained only "inconsequential" errors (M.D., App. 17), was "worthless" because of a nondisclosure which neither affected the validity of the conclusions nor the use of the report (M.D., App. 17). This is clearly a conclusion of law, for which there is no foundation.

Hilltop argues (Ans. Br. 38-40) that the court may use discretion as to damages. Washington law controls this question, since it is a matter of proof. Restatement, Conflict of Laws, Sec. 595. No doubt a trier of fact may use discretion in measuring damages, once found to exist, but the *existence* of damage is something which must be clearly established. *Wenzler & Ward Etc. Co. v. Sellen*, 53 Wn.2d 96, 330 P.2d 1068 (1958). In this case, the court erroneously assumed the fact of damage.

Hilltop further urges that the sisters were third

party beneficiaries of the Hilltop-Smith agreement (Ans. Br. 38-40). Since in its final judgment the trial court dismissed the contract action as to all parties including Hilltop (R. 2148), the status of the sisters would make no difference. The trial court specifically held that, "Smith fully performed its contract . . ." (M.D., App. 17).

Nevertheless, the court had earlier indicated that in his opinion the sisters were merely incidental beneficiaries and had said, "my mind is pretty well resolved on that phase of it, right or wrong" (O.O., App. 7). That the court was right on this issue is demonstrated not only by the facts but by the applicable law. There is nothing in the facts to indicate any relationship between Hilltop and the sisters which would suggest a gift intent. Further, the facts do not support the assertion that the sisters were creditor beneficiaries. The undertaking by Hilltop to procure a market analysis was for Hilltop's own benefit, to win an extension of its exclusive brokerage agreement (A.F., App. 41-42). See 1 Restatement, Contracts, § 133 and 4 Corbin, Contracts, § 787. Illustration 1, 1 Restatement, Contracts, § 147 shows clearly that the sisters would be categorized as incidental beneficiaries. Ohio appears to follow the Restatement of Contracts' approach. *Visintine & Co. v. New York, Chicago & St. Louis Ry. Co.*, 169 Ohio St. 505, 160 N.E.2d 311 (1959).

#### **Finding No. 9 (Ans. Br. 7, 40-45)**

We do not claim that the court's expression after trial of a "very definite opinion that the concealment in law amounted to constructive fraud" (O.O., App. 7) governs the court's later formal finding of "wanton and reckless disregard" (M.D., App. 12). We do not contend that punitive damages are not supportable under Ohio law by a finding of "wanton and reckless disregard" (Op. Br. 62-65). We also believe it appropriate for us to point out, as bearing on whether punitive damages are justified, that the rejection of the trier of facts on August 6, 1965, im-

mediately at the conclusion of the twelve-day trial, was a "very definite opinion that the concealment in law amounted to constructive fraud." Imposition of punitive damages in Ohio is not supported by a finding of constructive fraud (Op. Br. 42); rather, findings of actual fraud and actual malice are necessary (Op. Br. 62-65).

#### **Finding No. 10 (Ans. Br. 7, 45-46)**

We do not question the trial court's finding that the nondisclosure of the Severance negotiations was authorized by Treiger's fellow employees, Orndahl and Imus. Our contention is simply that the award of punitive damages was improper, since none of the partners authorized or ratified Treiger's action (Op. Br. 71-79). As Hilltop itself points out (Ans. Br. 46) the trial court's finding that the non-disclosure was pursuant to "company policy" simply means that it was in conformity with the company policy to preserve the confidences of Austin. Surely no authorization of Treiger's action can be read into a general company rule that the confidences of clients be respected. What is more, the court found no such authorization (O.O., App. 6).

#### **Findings No. 11, 12, and 13 (Ans. Br. 45-56)**

Hilltop argues that the court properly inferred that one or more of the Smith partners either authorized or ratified Treiger's conduct. All of the direct evidence is to the effect that the partners never even heard of Hilltop or Nutwood until this suit was threatened (Op. Br. 71-79).

Hilltop cites a company meeting in Washington on September 28, 1959, attended by Larry Smith, to support an inference that Larry Smith must have known of and approved Treiger's action (Ans. Br. 49). The minutes of this meeting, which were produced in discovery (Ex. 254), do not show that Nutwood was a topic of discussion. The participants in the meeting all testified that Nutwood was not dis-

cussed, to the best of their recollection (Kelly Tr. 2191-92, Treiger Tr. 2303, Imus Tr. 1890-91; see Larry Smith Tr. 2446). We have discussed previously the other "evidence" of authorization and ratification (Op. Br. 71-79), none of which supports any sort of inference.

The "succeeding events" referred to fleetingly on pages 49-50 of Hilltop's brief are typical of the stuff from which Hilltop would fashion an inference. But these "events" are all geared to creating an impression that Smith rendered a negative report for some ulterior reason, an inference which the trial judge expressly rejected. Hilltop's style of ignoring the record in compiling "events" may be illustrated by its charge that the Nutwood report was hastily drafted over the Christmas holidays rather than the 90 days forecast (Ans. Br. 49). Actually, no report such as was contemplated by the original agreement was ever rendered. When Smith's preliminary research was completed, and it became evident that the Nutwood site was hopeless for near term development as a shopping center (see Marshall Tr. 931), the parties agreed that Smith would furnish a "memorandum" instead of a formal report and would reduce its fee accordingly (A.F., App. 59). Hilltop paid \$2,920 for the memorandum, instead of the \$4,500 originally agreed for a full report. Work on the Nutwood analysis commenced on about December 7, 1959 (A.F., App. 53), and not "over the Christmas holiday period." John Marshall, who was in charge of the analysis, testified that he had adequate time to make the analysis (Tr. 915).

#### **Finding No. 14 (Ans. Br. 7, 45-56)**

Hilltop strains to make of Ray Treiger some sort of arch villain whose sole occupation, guided by Larry Smith himself, was to sink Nutwood as an incipient threat to Severance. Not only is there a total lack of showing that Treiger ever discussed Nutwood with Larry Smith or any other then partner, but Treiger's timesheets during the period September, 1959 through



January, 1960 show how far fetched any inference would be that he did so. During the five-month period, Treiger accounted for about 1,170 hours. Except for October 8, 1959, the day of his visit with Petti and O'Neill in Cleveland, Treiger's sheets show a total of 16 hours spent on Nutwood and 11 hours on Severance (Ex. 155). Thus, Hilltop and Severance together accounted for about three percent of Treiger's total time for the five-month period; as to Nutwood, he delegated the judgment-making in this routine assignment (Marshall Tr. 914-15, Darmstadter Tr., App. 94-95) to Marshall and Darmstadter, neither of whom had any inkling that the Smith firm was negotiating on Severance. The district judge expressed his view of Hilltop's assertion that Treiger must have told Larry Smith about Hilltop, in the following terms:

“Well, I am afraid I would have to do an awful lot of stretching to attach that implication to it” (Tr. 2448).

Hilltop asks this court to draw an inference of ratification of Treiger's conduct from the retention of him as an employee (Ans. Br. 54-56). The trial judge did not draw such an inference. Smith would have no occasion to fire a valued employee for what it believes, at worst, was a mistake of judgment (Op. Br. 44-45). In any event, mere retention of an employee affords no basis for holding an employer liable for vindictive damages. Ratification requires some affirmative act. 25 *C.J.S.* 737, Damages, Sec. 126.

Hilltop bases its argument upon *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E. 2d 224 (1946). But, in that case, decided 4-3, the principal was present when his salesman represented an old watch to be a new one. The *Saberton* ruling was obviously based upon a quoted passage from 15 *Am. Jur.* 731 which indicated that the failure of a defendant to intervene when present at a transaction amounts to ratification. No such situation exists in the present case.



**Finding No. 15 (Ans. Br. 7, 45)**

Hilltop has not even bothered to argue the correctness of this conclusionary finding. There is no support for it in fact or in law (See Op. Br. 40-51, 58-61).

**Findings No. 16, 17, 19 and 20 (Ans. Br. 8-9, 56-61)**

Most of Hilltop's argument is refuted by our opening brief (pp. 66-69). Seeming to realize that the factors which the court relied on as justifying punitive damages do not support the award, Hilltop lists six more items of information which Smith allegedly withheld, and which Hilltop claims it had to commence litigation to discover. Those contentions and our answers are as follows:

- (1) "Smith was buying a competitive property while purporting to give an objective report on a competing property, Nutwood;"

Hilltop learned of Smith's purchase of Severance in July, 1960 (A.F., App. 79-80), and was told the details on February 15, 1961, two years before suit (O'Neill Tr. 2666-67). Obviously, it did not have to litigate to discover these facts.

- (2) "Smith knew . . . that the site on which he was asked to make such a report was in the very trade area of Severance;"

Hilltop was told by Smith on or about January 8, 1960, when Smith mailed the Nutwood memorandum to Hilltop (A.F., App. 59) that Severance was within the Nutwood trade area (Ex. 29, App. 160). Before that, when he first met Petti and O'Neill, on October 9, 1959, Treiger emphasized the possible conflict of interest between Smith's working on Severance and Nutwood (A.F., App. 48).

- (3) "That the report was not scientific, but one in which judgment could vary widely;"

There was never any contrary assertion. Petti and O'Neill were well aware that they were asking for an opinion (A.F., App. 45, 47-49). They even discussed

quite cynically the possibility of hiring a different consultant because they understood that firm to have submitted a previous report which "makes an argument favorable to our location [Nutwood]" (A.F., App. 40). The Nutwood analysis itself (Ex. 29) is couched in terms of "opinion". (See, e.g., App. 152, 162).

- (4) "That other nationally recognized consultants were available;"

Petti, of course, knew this from the start, having written to two other consultants concurrently with writing to Smith (Ans. Br. 31, A.F., App. 43, 49). As late as October 23, 1959, there was still a possibility that Hilltop might hire someone other than Smith (Petti Tr. 356).

- (5) "That such an objective and favorable report would be a valuable and virtually essential prerequisite to attracting department store tenants."

Smith never asserted that its report had such miraculous powers. The evidence showed that department stores rely on their own analyses, rather than those of an outside firm retained by the owner of the property under consideration (Walton Tr. 2071-72, Petti Tr. 421-25). One developer, according to Petti, would not "have paid any more attention to the [Smith] report than the man in the moon" (Tr. 380). Another told Petti unequivocally that he preferred to make his own studies (Tr. 360).

- (6) "That its concealment continued . . . between . . . January 4, 1960 and the sale of Nutwood on April 29, 1960 . . . ."

Again, Smith's position at Severance was known to Hilltop years before litigation was commenced (See Op. Br. 66-69).

How these six items in any way justified litigation is impossible for us to discern.

On pages 59-60 of its brief, Hilltop in what appears to be an irrelevant diversion from Findings 16-20,

states that several stores showed interest in the Cleveland suburbs. What Hilltop neglects to add, however, is that these stores were pursued unsuccessfully by Austin to go into Severance.

We feel it an impermissible jump to argue from the fact that Austin unsuccessfully pursued department stores A, B & C for Severance, that a positive report by Smith might have landed them at Nutwood.

**Finding No. 18 (Ans. Br. 9, 56)**

Again, Hilltop has not presented any argument to support this conclusionary finding.

**Finding No. 21 (Ans. Br. 9, 62)**

Hilltop's argument requires no answer beyond our opening brief (p. 65-71). At the court's request, we filed comprehensive exceptions to the expenses and attorneys' time incurred by Hilltop (R. 1914-2012). We concluded that, even if Hilltop were somehow entitled to recover its litigation expenses, \$15,500 was the most that should be awarded (R. 1949), and that the maximum hours which Hilltop could reasonably charge for its attorneys was 925 (R. 1948). Actually, Hilltop incurred no attorneys' fees, since its attorneys were employed on a contingent fee basis. To overcome the problem posed by this fact the trial judge ordered Hilltop and its counsel to rescind their agreement, which they did (Ans. Br. 63, R. 1488-89).

**Finding No. 22 (Ans. Br. 66-71)**

This "finding" relates to the trial judge's conclusion that the case was a proper one for application of the Ohio law of punitive damages (See Op. Br. 54-59).

Hilltop's argument in support of the application of Ohio law is based in large part upon cases dealing with the question whether or not to allow action to be brought on a foreign wrongful death statute. Such cases have little bearing here, since Washington law,

if applied, would allow this action and allow fully compensatory damages. It would merely preclude the use of the civil court for punishment, which is the function of punitive damages as understood by the courts of both states. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891); *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E. 2d 224 (1946).

Even the cases cited by appellees support our position. Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918) (Ans. Br. 68) said that courts, "do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Washington's tradition against using civil process for punishment certainly is deep-rooted, having been adhered to since the question was first presented in *Spokane Truck & Dray Co. v. Hoefer*, *supra*. Punitive damages, according to that decision, are based upon a theory "which is repugnant to every sense of justice;" further, "the doctrine of punitive damages is unsound in principle and unfair and dangerous in practice . . . ." 2 Wash. at 54, 56, 25 Pac. at 1074-75.

*Smyth Sales v. Petroleum Heat & Power Co.* 128 F.2d 697 (3rd Cir. 1942) (Ans. Br. 70), does not stand for the proposition that Washington would allow Ohio punitive damage law to apply. The forum state in *Smyth*, New Jersey, apparently allows punitive damages as a matter of local law, so would not regard foreign punitive damage laws as penal. Judge Goodrich, in the *Smyth* opinion, stated the rule which we think controls here, as follows:

" . . . The measure of damages, compensatory or exemplary, in tort actions, is determined by the law of the place of wrong, except that in some instances the forum may not allow exemplary damages even though allowed by the law of the state where the wrong occurred because the forum considers them penal." 128 F.2d at 702.

The citation by Hilltop of *Anderson v. Knox*, 297

F.2d 702 (9th Cir. 1961) and *Reynolds Metals Co. v. Lampert*, 316 F.2d 272 (9th Cir. 1963) (Ans. Br. 44-45) are not apposite since this case will not be determined under the laws of Hawaii or Oregon. The first quote at p. 44 of Hilltop's brief is not from the opinion of this court, but of a court of Hawaii.

#### IV. CONCLUSION

In its answering brief Hilltop does little to join the issues on this appeal. Instead it has sought to bury the true issues in an avalanche of irrelevancies and misleading statements. For example, in its "Conclusion" Hilltop quotes from Exhibit 313 (Ans. Br. 71), an undated document offered post-trial (R. 2192) but never identified in the trial or post-trial record by any witness. If, as Hilltop suggests, it is a report on severance sent by Smith to a financial house on March 20, 1959 (Ans. Br. 24), it was sent six months before anyone connected with the Smith Company ever even heard of Nutwood. Again, in its "Conclusion" Hilltop implies, by citing F.R.C.P. 52(a) (Ans. Br. 72), that the trial court found Smith to have made a "false report" (Ans. Br. 71) with an ulterior motive, to damage Nutwood. But the court found Hilltop's three year attack on the report to have unearthed only "inconsequential errors" (M.D., App. 7), found Hilltop's charges as to Smith's motive to be completely without merit (R. 2134-35), and found Hilltop's contentions of damage to amount to "no more than speculation and conjecture" (M.D., App. 10).



For the reasons set forth in our opening brief, we ask that the judgment, insofar as it awards compensatory or punitive damages or attorneys' fees to Hilltop or to the sisters, be reversed.

Respectfully submitted,

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### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

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OPENING BRIEF OF HILLTOP REALTY, INC., et al.,  
AS CROSS-APPELLANTS

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2 Am.Jur.2d, Damages, §25 . . . . .	61
2 C.J.S., Evidence, §593(3), note 93.10, p. 737 . . . . .	59
Gruen & Smith, Shopping Towns U.S.A. (1959) . . . . .	8, 52, 54
4 Nichols, Eminent Domain 251, §12.322[2] . . . . .	55
4 O.Jur.2d, Fraud and Deceit, §35 . . . . .	50





UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

HARRY P. SMITH, et al.,	Appellants,	)
vs.		)
HILLTOP REALTY, INC., et al.,	Appellees,	)
_____		)
HILLTOP REALTY, INC., et al.,	Cross-Appellants,	)
vs.		)
HARRY P. SMITH, et al.,	Cross-Appellees,	)
and		)
THE AUSTIN COMPANY,	Additional Cross-Appellee	)
	as to Count No. 4 Only.	)

No. 21207

ON CROSS APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

OPENING BRIEF OF HILLTOP REALTY, INC., et al.,  
AS CROSS-APPELLANTS

INTRODUCTION

Cross-appellants incorporate by reference its introductory  
statement of its Answering Brief on appeal (Hilltop Ans. Br. 1-2)  
as to designation of names used herein.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of counts 1, 2 and 3 by  
diversity and amount, 28 U.S.C., §1332 (R. 1ff, 100ff, 1053);  
and of the Sherman Act count 4 under 15 U.S.C., §§1, 2 and 15, and  
28 U.S.C., §§1331 and 1337.

This Court has jurisdiction of this Cross Appeal under 28 U.S.C., §§1291, 1292 and 2107, and F.R.Civ.P. 54(b) and by Notice filed June 13, 1966 (R. 2185) from a Final Judgment entered May 16, 1966 (R. 2146, 2234) in this multiple claim party case (R. 2148).

#### SUMMARY OF PLEADINGS ON CROSS APPEAL

In January 1963, Hilltop alleged four causes of action against Smith: (1) fraud, (2) breach of contract, (3) violation of Ohio State Antitrust Law, and (4) violation of the Sherman Act (R. 1ff).

The antitrust causes were sustained after full brief oral argument in the Court's Memorandum Decision of May 1, 1964, attached as Appendix A. The Court over-ruled Smith's Motion to Dismiss without prejudice to review after pretrial was conducted (R. 21-2).

In July 1964, after partial pretrial, Hilltop filed First Amended Complaint which numbered the four causes as separate counts, added additional Smith defendants, and named Austin as an additional defendant on the Sherman Act counts only (R. 100ff). Further pretrial by all parties continued through the winter of 1964 (R. 2221ff).

Smith and Austin respectively filed Motions for partial summary judgment and dismissal of the antitrust counts (R.

11). The Court terminated further discovery by a freeze order (R. 530, 532) and directed the parties to submit a "detailed concise statement of its factual contentions as to all counts", showing expected method of proof and references to exhibits, depositions and other discovery (R. 531-2). Hilltop complied (R. 651). Smith and Austin filed contentions which disputed many facts claimed by Hilltop (R. 692, 725, 752, 783).

In 1965, after briefs and oral argument, the Court reversed its 1963 decision (R. 21-2). The antitrust portion of its Amended decision (R. 827-36 at 829-31) is attached as Appendix B. It assumed as true Hilltop's Contentions and reasonable inferences but concluded they did not state antitrust violations. Accordingly, it granted partial summary judgment and dismissal (R. 827, 948, 950). Hilltop preserved its jury demand on those counts if referred for trial on the merits (R. 2147-8).

The remaining counts for fraud and breach of contract were later tried to the Court which found the Smith defendants guilty of actual fraud which was "calculated, deliberate and intentional" (R. 1473) and

"guilty of 'extreme and exceptional conduct' constituting a 'gross fraud' which was 'intentional and deliberate'". (R. 2035)

It applied Ohio law and awarded compensatory and punitive damages and attorneys' fees (R. 1474, 2038, 2149-50). It dismissed the contract count (R. 1470).

Smith's appeal and brief challenge the judgment. Hilltop is concurrently filing its Answering Brief supporting the findings and judgment on the fraud count; except as raised Cross Appeal.

## CONCISE STATEMENT OF THE CASE ON CROSS APPEAL

### Questions Involved:

Do Hilltop's Contentions\* state antitrust violations which entitle it to jury trial against the Smith defendants?

If so, do these same facts, plus those relating to Austin's participation, entitle Hilltop to jury trial of the Smith defendants, and also Austin on the Sherman Act count?

Did the Court err in finding that Hilltop had failed to sustain its burden of proof as to the amount of compensatory damages for fraud, or for negligent breach of contract?

Did the Court err in other respects stated as Specific Points of Errors and briefed successively herein in the Argument?

### Manner In Which Raised:

The antitrust issues are raised by the Court's interlocutory decision (R. 829-31) and orders of partial summary judgment and dismissal of the antitrust counts without jury trial on the contract count in a multiple party and multiple claim case (R. 948, 950). The contract count is raised by the Court's Memorandum Decision

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\*R. 651ff, 680-9, and Affidavit, R. 567-70, incorporated by reference, R. 689-90, 2300-2, 2421-2.



October 27, 1965 (R. 1470). No orders under F.R.Civ.P. 54(b) 28 U.S.C. §1292(b) were entered (R. 948, 950). Appeal became merely only after the Orders were included in the Court's Final Judgment entered May 16, 1966 (R. 2146, 2148). School District . 5 v. Lundgren, 259 F.2d 101 (9th Cir. 1958); Lundgren v. Seeman, 292 F.2d 489 (9th Cir. 1961).

The compensatory damages issue on the contract and fraud counts is raised by the Court's finding that Hilltop failed to meet its burden of proof (R. 1470, lines 5-21). Hilltop believes that, after review, this Court will conclude that this finding was clearly erroneous under F.R.Civ.P. 52(a) as to leave the definite and firm conviction that a mistake was committed. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 1 L.ed. 746 (1948).

The other questions presented are related and stated in the Specification of Errors below.

#### Statement of Facts:

Hilltop's counter-statement of facts of the Court's findings of actual and gross fraud in Hilltop's separate Answering Brief and that issue are the same facts incorporated into the breach of contract and antitrust counts (R. 7-8, 111-2) and contentions (R. 690). To avoid repetition, they are incorporated by reference.

#### A. Intrastate Commerce.

The parties agreed that Ohio antitrust law, Baldwin's Ohio

Rev. Code, ch. 1331, and the Sherman Act, 15 U.S.C., §§1 and 2 (R. 831) are the same. A substantial number of alleged acts were in interstate commerce. They were incorporated by reference to the interstate antitrust count (R. 690).

B. Interstate Commerce.

Defendants, the Smith partners and executives, were engaged in interstate commerce in conducting a nationwide and international business of real estate counseling and development with offices throughout the United States and elsewhere (R. 681). Negotiations between Hilltop and Smith were conducted generally by intercity mail and interstate telephone (R. 681). Defendant Austin is one of the nation's largest engineering and construction companies with offices throughout the United States and overseas (R. 681). The Smith defendants and Austin negotiated with various national and interstate chain and department stores to lease space in Severance (R. 681). They furnished various Smith-Austin blueprints to department stores in New York (R. 681).

The Higbee Co. is a Cleveland department store and part of a national chain. The Halle Bros. Co. is another Cleveland department store and it has another department store at Erie, Pennsylvania. Both stores make substantial purchases from outside the State of Ohio (R. 681).

The construction of the \$16,000,000 Severance Shopping Center involved substantial purchases and shipments of materials, etc.

and supplies from outside the State of Ohio (R. 682). The financing of the purchase and construction of Severance Shopping Center involved interstate and international negotiations (R. 682).

### C. Restraints of Trade.

The conspiracy of the Smith defendants and those of Austin which restrained the development of a regional shopping center at Nutwood impeded a substantial flow of commodities in interstate and foreign commerce for its construction, and a substantial volume of goods that would have been bought at wholesale and moved in interstate and foreign commerce and sold at retail at Nutwood; and a not insignificant quantity of goods that would have been resold at retail for delivery to interstate and foreign commerce. It impeded financing of Nutwood through channels of interstate and foreign commerce (R. 682).

### D. Relevant Market.

The relevant market consists of sites for regional shopping centers to serve the entire east side of Greater Cleveland, Ohio (R. 683). The term "regional shopping center" was defined in Smith's report on Nutwood (App. to Ex. 29; Ex. 225) as follows:

". . . A regional shopping center is generally designed to serve a trade area population of from 150,000 to 400,000 people. The size . . . may range from 350,000 square feet to over 1,000,000 square feet. Department stores are the dominant tenants, and normally occupy about one-third to one-half of the total area. The function of such a center is to create complete comparison shopping facilities with a strong attraction for customers living as much as 10 to 15 miles from the

site, depending, of course, upon existing competitive facilities, access routes, etc. The area of strongest influence for such a center normally extends from three to six miles from the development . . ."

Such regional shopping center sites should come as close as possible to fulfilling eleven standard requirements enumerated in Larry Smith's book, "Shopping Towns USA" (1959). Its first criterion provides:

- "1) The site must be located in the general area established as most desirable by the economic survey . . ."\* (R. 683; Ex. 368, p. 38)

Nutwood fulfilled all of the eleven ideal requirements\* but was a part of both the fraud and antitrust conspiracy, Smith declared Hilltop as to Item 1 by making its false and fraudulently made "economic survey" on the potentials of Nutwood for a shopping center (R. 683-4; cf. R. 651-80, 690).

#### E. Antitrust Violations Alleged.

Defendants, the Smith partners and its executive officers, as one group, and also Smith and Austin as another group, violated the Ohio antitrust laws and the Sherman Act and combined efforts, skill and the acts of two or more persons, and entered into combinations and conspiracies to unlawfully restrain intrastate and interstate and foreign trade, with intent to do so; and attempted to monopolize for the purpose of preventing the development

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\*The eleven requirements are quoted in the analysis showing that Nutwood fulfilled all requirements (Argument, Section D, p. 2).



competitive regional shopping centers in the eastern suburbs of Greater Cleveland, including those at Beachwood and at the subject Beachwood property (R. 684).

The Smith-Austin conspiracy proceeded through four stages:

(1) The first stage began April 23, 1955, when Austin engaged Smith as its real estate consultant and market analyst to develop a regional shopping center at Severance (R. 684). During this period, they conspired to dominate the relevant market through persuading The Higbee Company and The Halle Bros. Co. by obtaining reports to "marry the competition" and divide the market so as to eliminate potential competition from other shopping centers; and by taking all possible steps to "avoid the risk of a third development taking place" so as to dominate the entire east side of Cleveland (R. 684-5).

On June 11, 1957, Austin arranged a meeting between "The Halle Bros. Co., Larry Smith & Company and Austin Company representatives". At that meeting, defendants Austin and Smith presented an agenda which urged Halle to join The Higbee Company as one of the major department stores in Severance to:

" . . . preclude\* construction of competitive facilities . . . "

and to:

" . . . preclude the development of a substantial amount of specialty store space . . . " (R. 567-8)

The quotations are from pretrial exhibits, depositions, etc. All emphases herein are from emphases supplied in Hilltop's Contentions and Affidavit unless otherwise noted.



Austin participated with Smith in advancing these "economic" arguments which Austin has described as "slanted" to persuade both department stores, by differently phrased approaches to

"marry the competition"

in order to keep the Severance Shopping Center "dominant" and to try to:

" . . . avoid the risk of a third development taking place" (R. 568)

Similarly, in the meeting planned by Austin and Smith to try again to persuade Halle to join Higbee at Severance, Austin notified Smith that:

" . . . we would like to control the meeting . . . " (R. 568)

Smith prepared for Austin brochures for distribution to potential lessees. An illustrative brochure discussed other potential competitive shopping center sites in the eastern Cleveland suburbs, in the municipality of Beachwood, about 10 miles from the location of Severance. This brochure cautioned against Beachwood as follows (R. 568):

"Of course, if both Higbee's and Halle's locate at [Severance], the Beachwood locations might be regarded as future competitive threats.

"We believe that the threat imposed by the availability of Beachwood is virtually eliminated by the lack of an effective major tenant competitive with either Higbee or Halle." (Emphases in text.) (R. 568-9)

Higbee, in summarizing a telephone conference with Treiger, sent a copy of its summary to Austin "just so that everyone is kept fully informed of the others' activities". That summary states in part:

"The two stores of Halle's and Higbee's when combined together with a well-planned group of supporting stores should produce the most effective competition against the new May Company store and should stop further suburban erosion of department store type merchandise sales on the East side of Cleveland for a great number of years."  
(R. 569)

Austin and Smith continuously urged:

". . . the necessity for both department stores to get off the stick . . . and start actively negotiating . . ."

order to have:

". . . enough department store space to dominate the east side . . .". (R. 569)

(2) The second stage began on May 29, 1958, when Austin decided to abandon its role as a shopping center developer of Severance and notified Smith of its decision and requested Smith's help in disposing of Severance. During this period, they continued their efforts described above to dominate the east side market. The motive shifted to one of obtaining for Austin the highest selling price. During this period, Austin was the seller and Smith the broker consultant. Smith's efforts to find an outside buyer for Severance at the price and conditions set forth by Austin were limited and unproductive (R. 685).

(3) The third stage began December 15, 1958, when Smith came interested in buying Severance from Austin. During this period, Austin and Smith negotiated their unique buy-and-sell agreement. Austin gave Smith the exclusive right to negotiate the purchase of Severance and Smith gave Austin the exclusive right to be the engineer, architect, and building contractor of Severance without competitive bids. During this period, Smith and Austin continued their efforts to dominate the east side market (R. 686).

Near the end of this period, on December 22 and 23, 1958, Higbee and Halle, two of the three leading Cleveland department stores, signed 25-year leases as the major tenants of Severance, thus culminating over four years of Smith-Austin efforts to create a shopping center strong enough to dominate the east side market and preclude competition of other potential shopping center sites (R. 686).

At this time, Smith succeeded in its pursuit of Hilltop to make the market study of Nutwood, which had coincidentally been viewed as a threat to the Severance monopoly. Smith knew that if he did not procure the Nutwood job, there were other analysts who would render an objective report (R. 686).

Smith's abortive and falsified report was concluded within a few days and delivered on January 8, 1960 (Ex. 29). In spite of their disappointment, Hilltop and the owners were persuaded by Treiger on January 18, 1960, to "accept" the report (R. 56).

The discouragement of Nutwood was a necessary step to  
Smith's continued success because a favorable report on Nutwood  
could have meant competition for Severance. Any publicity favor-  
able to Nutwood could have upset the Austin-Smith negotiations  
with Higbee and Halle, and the development of Severance (R. 686).

Treiger, in urging Higbee and Halle to "marry the competition",  
pointed out "two other important advantages" that would accrue to  
each of the stores by locating together:

"'1. They would gain a fuller insight into and  
control of the operations and promotions of the  
other store with mutual advantages accruing to both.

"'2. If the two companies developed together there  
would be a smaller amount of specialty store compe-  
tition than would arise if the stores were to locate  
at different sites.'" (R. 688)

Higbee's main downtown store has signs on its first floor  
reading, "Higbee's will not be undersold". But at Severance, the  
Higbee branch located in the same center with Halle has no such  
sign (photos available). (R. 688)

On February 10, 1960, the Austin-Smith agreement to sell  
Severance to Smith (R. 670) was executed (R. 686). This was a  
secret non-publicized agreement (R. 686).

(4) The fourth and present stage began March 28, 1962, when  
Austin reacquired a 30% interest in the Severance Center (R. 687).  
The project was opened in November 1963. Since that time, Smith  
and Austin have jointly enjoyed the results of their combination



and conspiracy to restrain trade and to monopolize by dominating the relevant market to assure profitable revenues to both of them from shopping center tenant leases based on square footages and sales, and capital gains accruing from increased residential land values (R. 687).

Smith's advice was at all times adopted and followed by Austin (R. 687).

Austin's entire file on the economic development of Severance Center from May 2, 1955, to August 29, 1958, is seriously missing. They were in two steel cabinets at the time Austin closed the doors of its Severance office for the last time on August 29, 1958. It is an unusual thing for Austin to turn over its files to any company. They were still there when Smith visited the property on February 16, 1960. They were not produced by any of the defendants (R. 687).

Austin and Smith are unable to account for their disappearance (R. 569). Austin claims these papers were turned over to Smith. Smith claims no papers were turned over to it except certain corporate papers and some architectural drawings, etc. The content of these two steel filing cabinets as to memoranda, meetings, or letters written to prospective tenants, or other documents that may relate to this Complaint is unknown (R. 570).

They must have contained many important items. For example, the restrictive terms of earlier drafts of the leases for the



establishment of branch stores by Higbee or by Halle were not revealed in any papers tendered by Smith or by Austin. They were first received from the Higbee and Halle tenders pursuant to the order of the Ohio court (R. 687-8). The exact terms of the department store leases have not been produced because the court initially upheld Smith's objection to their production on the ground they would disclose terms to Hilltop which might be engaged in a competitive business (R. 688). The leases apparently contained, at least in earlier drafts, certain restraints upon department store tenants not to establish other branches within three to five miles of Severance. The department stores protested (R. 688). The effort to impose these restraints is further admissible evidence of an intent to restrain trade and to monopolize (R. 688).

The only fact established through witnesses examined thus far is that the papers comprised Austin's entire file on the Severance project and are missing (R. 570). The absence of these papers is circumstantial evidence supporting these contentions (R. 687).

The conspiracy to restrain trade unreasonably and to monopolize or attempt to monopolize, which started in 1955, continued impeded with the elimination of Nutwood. Severance opened in 1963 and "from the beginning has been successful" (R. 689).

Smith's false report on Nutwood deprived Hilltop of the one essential ingredient to develop another regional shopping center. The property would have supported such a center (R. 689).

If Hilltop had received a true report, it would have been able to sell the property to others at its true value for a promising regional shopping center site; or, alternatively, have developed the property, together with the owners or others, by attracting a major and/or junior department store and other satellite tenants which support a regional shopping center (R. 689).

The Smith and the Austin defendants' wrongful acts were the proximate cause, with the foreseeable result, of Hilltop's loss in selling Nutwood at \$3,500 per acre when its true value was a minimum of \$17,500\* per acre (R. 689).

Smith-Austin defendants' wrongful acts were concealed and not discovered until they produced portions of their files pursuant to discovery beginning September 1963; a second group of files were produced April-May 1964; a third group, October-November 1964; and a fourth group not produced until December 1964 - after the scheduled group of eastern depositions had terminated (R. 689).

All the foregoing was with the intent to restrain trade

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\* \$20,000 in text (R. 689). Changed to conform to evidence. Argument, Sec. E, p. 68; Ex. 334A, p. 9.

attempt to monopolize for the purpose of preventing development of other competitive shopping center sites in Eastern Cleveland (supra, R. 683, 684).

F. Breach Of Contract.

The breach of contract contentions (R. 677-9) incorporated and reference the additional facts alleged in the fraud and anti-trust contentions (R. 690).

SPECIFICATION OF ERRORS ON CROSS APPEAL

It is respectfully submitted that the Trial Court erred in the following respects:

1. In concluding that Hilltop's Contentions and Affidavit did not state antitrust violations against the Smith defendants and executives, as well as Austin (R. 827, 831, 950, 953), thereby denying jury trial on the merits (R. 9, 114, 1053-4, 2147-8).
2. In failing to find that Smith wilfully concealed from Hilltop the substantive information in its prepared but undelivered introduction to the Nutwood market analysis, which concealment resulted in damages to Hilltop (Ex. 175).
3. In finding that Hilltop failed to prove that the conclusions reached in the Nutwood market analysis (Ex. 29) were wrong, and in finding that the errors in the report were inconsequential (R. 1469, line 32; R. 1470, line 1; R. 2030, lines 8-10).
4. In finding that Hilltop failed to establish by the requisite burden of proof that, as a result of Smith's fraud and

breach of contract, Hilltop had sustained substantial damage in the sale of the Nutwood property (R. 1469 at 1470, line

5. In rejecting the testimony of Hilltop's expert upon the ground that it was predicated somewhat on hindsight on information not available at the time of, or prior to, sale of Nutwood, and in holding that comparable sales were probative of the value of Nutwood (R. 1469 at 1470, lines

6. In holding that Hilltop's evidence was speculative conjectural with respect to finding a buyer for Nutwood at higher price if it had received a favorable market analysis Smith (R. 1469 at 1470, lines 24-30).

7. In dismissing the contract action on grounds of failure to sustain burden of proof, or of speculative damages (R.

#### CONCISE SUMMARY OF ARGUMENT ON CROSS APPEAL

The Trial Court erred in granting partial summary judgment and dismissal of the antitrust counts because there were substantial disputed facts alleging prima facie antitrust violation "where motive and intent played leading roles and the proof largely in the hands of the alleged conspirators, and hostile witnesses thickened the plot."\* Hilltop was entitled to a trial on the direct and circumstantial evidence and all reasonable inferences alleged in its Contentions on these Counts.

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\*Poller v. Columbia Broadcasting System, 368 U.S. 464, 471-486, 7 L.ed.2d 458 (1962).



The Court erred as a matter of law in rejecting the testimony of Hilltop's expert appraiser on the ground that it was predicated somewhat on hindsight and in therefore concluding that Hilltop had not sustained its burden of proof. Therefore this Court, under F.R.Civ.P. 52(a) should remand the proof of damages to the Trial Court for reconsideration of the present record and rehearing to the extent this Court directs.

Argument on each Specification of Error is stated below.

#### ARGUMENT ON CROSS APPEAL

A. Hilltop Is Entitled to Jury Trial Of Its Antitrust Counts. [Spec. of Error No. 1].

The Trial Court accepted as true Hilltop's Contentions and its Affidavits (R.555-589, 624-650) incorporated by reference (R.2421-2) and all reasonable inferences to be drawn therefrom (R.829, lines 6-10; 651 ff). It correctly found that:

" . . . plaintiff's basic complaint is the submission to it by Smith of a false market analysis report which caused Hilltop and the Winslow sisters to sell the Nutwood property at a price substantially below that which they could have obtained if they had sold it for shopping center development. Smith's alleged objective was the suppression of potential competition to its Severance shopping center. Austin is alleged to have conspired with Smith in the general objective of restraining shopping center competition . . . (R. 829, lines 10-19)

it it concluded that:

" . . . no contention is made that Austin conspired in any way specifically with respect to Nutwood." (Emphasis supplied) (R.829, lines 19-20)



Hilltop submits that a "specific" conspiracy against wood is not required. It is sufficient, if a jury could find from all the evidence supporting the contentions and reasonable inferences, that it was reasonably foreseeable that Hilltop, as agent, and the Winslow sisters, as owners of the Nutwood property, would be damaged in their property by selling it at less than its fair value because of Smith's fraud coupled with Smith and Austin's objectives to suppress potential competition for any other regional shopping center sites in the eastern suburb of Greater Cleveland, including Nutwood (R.683-4).

Many cases have considered the "target area" issue. It is unnecessary to review the earlier cases because of two recent controlling decisions by this Circuit:

Twentieth Century Fox Film v. Goldwyn, 328 F.2d 190, (9th Cir. 1964), concludes:

" . . . there is language [in prior cases] indicating that one was not in the 'target area' unless he was 'aimed at' by the conspirators.

"But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather. . . the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy."

Harman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1965), rejected a narrow construction of the target area and held that these limitations do not appear in §4 of the Clayton Act,

5 U.S.C. §15, and held that courts:

" . . . should not add requirements to burden the private litigant beyond what is specifically set forth by the Congress . . . " (339 F.2d at 567)

Nutwood was admittedly in the Severance trade area (R.1189) and therefore in the "target area". Hilltop should be entitled to prove to a jury its reasonably foreseeable damages.

The Court also erred in assuming the necessity of connecting Smith and Austin to establish a conspiracy. Smith is a partnership -- not an entity. All of the Smith partners and Kreiger were alleged to have violated the antitrust laws on substantially the same facts as in the fraud count. On many of the same facts alleged in Hilltop's antitrust contentions, it held:

" . . . the competitive positions of Nutwood and Severance, and other suspicious circumstances fully justified the prosecution of the fraud and contract counts . . . and also . . . the antitrust counts up to a point which the court need not determine . . . " (R. 2030).

The Court found Smith guilty of gross fraud for "extreme and exceptional conduct" which was "intentional and deliberate". (R. 2035) A jury could find them guilty of the antitrust violations, proximately resulting in substantial damages to the Winslow sisters and Hilltop from the sale of their property even though, on the fraud count, the Court held that the burden of proof was not sustained. In Fox West Coast Theaters Corp. v. Paradise T. Building Corp., 264 F.2d 602, 605 (9th Cir. 1958), this Court held:

"It makes no difference that the jury found the facts and the intentions of the parties proved a conspiracy

here, whereas a trial judge, sitting without a jury, found to the contrary on somewhat similar facts . .

While no Austin witness testified before it defied d  
ery (R.416 ff.), or before the Court's pretrial freeze ord  
Austin "conspired [as] to Nutwood" (R.829, line 20), this  
required since a jury could find that Nutwood was in the  
area" defined in Goldwyn, supra. It is enough that Aust  
spired with Smith

" . . . in the general objective of restraining shop  
ping center competition" (R.829, lines 18-19).

Nor is it required to show "simultaneous action or agreem  
Smith and Austin.

Interstate Circuit v. United States, 306 U.S. 208,  
227; 83 L.ed. 610, 620.

The Trial Court also erred in concluding that Peters  
Borden Co., 50 F.2d 644 (7th Cir. 1931), was a controllin  
cedent. It was an early §7, Clayton Act case, 15 U.S.C.  
Court construed it by substituting the two words "persons"  
"property" as follows:

" . . . The statute was not designed to give to stock  
holders (persons) who have been defrauded in the sale  
of their stock (property) treble damages for their in  
juries, nor indeed any new or additional remedy for  
such injury. If they have been thus defrauded, the  
law aside from the anti-trust statutes affords ample  
remedy." 50 F.2d at 645, 646. (Emphases added) (R. 13)

It erroneously drew an analogy to Hilltop and held:

"Hilltop and the sisters have an ample remedy indeed,  
since under Ohio law they may recover punitive damages  
[for fraud] which could conceivably total more than

t was error to conclude that because there is fraud and punitive damages, additional counts for antitrust violations are barred. Both "unlawful" and "fraudulent" acts may be alleged and proved in an antitrust action.

Harman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1964);

Walker Process Equipment, Inc. v. Food Mach. Chem. Corp., 382 U.S. 172; 86 S.Ct. 347; 15 L.ed 2d 247, 252 (1965).

This Court has recently held that a breach of fiduciary duty does not preclude an antitrust action:

Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 857 (9th Cir. 1965).

c distinguished "observations" in United States v. Boston & M. Co., 380 U.S. 157, 162, 85 S.Ct. 868, 13 L.ed.2d 728, that

" . . . Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference . . ."

and held under the Robinson-Patman Act, 15 U.S.C. §13(c):

"We do not regard the quoted observation as a definitive ruling that under no set of circumstances could commercial bribery be violative of any antitrust law. In our case the bribery not only undermined a fiduciary relationship which Congress sought to protect, but gave one seller a grossly unfair advantage over a competing seller. Where commercial bribery is associated with evils which a particular provision of the antitrust laws was designed to prevent, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute."

In Hilltop, the Trial Court described Hilltop's claim as one for "fraudulent breach of a fiduciary duty" (R.829) and found:



"By the very nature of the relationship between the parties, the plaintiffs had a right to rely on an absence of such a conflict of interest on the part of one from whom expert advice was sought." (R.1472-3)

Thus Smith's fraud likewise undermined a fiduciary relationship and caused the very anticompetitive results which Congress sought to prevent under the Sherman Act. It induced Hilltop to a promotion of Nutwood as a regional shopping center site which would have been competitive with the Smith-Austin promotion. Severance. Sale for less valuable uses damaged the proper interests of the Winslow sister owners and of Hilltop Real

All the other elements of an antitrust case were fully set forth in Hilltop's Contentions and Affidavit, i.e., the defendant's fraud and contract allegations adopted by reference (R.555 at 653-679); commerce (R.680-682); relevant market (R.683-684); violations of state and federal antitrust laws (R.684-691); successive stages of the Smith-Austin conspiracy (R.555 at 561-562, R. 651 at 680-690).

Hilltop submits that the Trial Court's original Memorandum Decision was correct in upholding the antitrust counts.

"Assuming the truth of the matters alleged in the complaint . . . I am of the opinion that plaintiff states a cause of action under the most recent decisions of the Supreme Court of the United States.\* . . . I may not agree with such decisions, but follow them I must. . .

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\*"Recent decisions" cited in 1963 (Papers 15 and 18 in Defendant's Court Clerk's file) included: Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.ed.2d 741 (1959); Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S.Ct. 365, 5 L.ed.2d 358 (1961); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.ed.2d 717 (1962); Re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.ed.2d 434 (1962); U.S. v. Southeastern Underwriters Assn., 322 U.S. 533 at 538, 68 S.Ct. 1001, 38 L.ed. 1001 (1944).



[d]efendants' motion to dismiss the Sherman Act claims . . . [and] the Ohio Antitrust Act [claim] will also be denied . . . without prejudice to their being again raised by defendants after the entry of a pretrial order." (R. 21, App. A)

Illtop's Contentions supported each count of its amended complaint with detailed pre-trial record references (R.656-691).

Summary procedures are not precluded in antitrust cases.

Tillamook Cheese & Dairy Assn. v. Tillamook Cheese Assn., 358 F.2d 115, 117 (9th Cir. 1966).

as this Court noted, the Supreme Court has admonished:

"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot [citing cases]. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Poller v. Columbia Broadcasting System, 368 U.S. 464 473, 82 S.Ct. 486, 7 L.ed.2d 458, 464 (1962).

Significantly, in Poller, the dissenting minority stated:

"In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits. 6/" 368 U.S. at 478, 7 L.ed.2d at 467.

ts supporting footnote 6/ for this minority view stated:

"There is no suggestion that petitioner was not afforded opportunity to examine any witness he wanted, either before or after respondents made their motion for summary judgment.' *ibid.*"

In contrast here, discovery was incomplete because Austin defied discovery. It terminated one Cleveland deposition and refused

to produce its president and other witnesses (R.416, 421). Court found Austin's action "was inexcusable", awarded attorney fees (R.954), and stated that if it concluded that Hilltop's Contentions supported antitrust counts, it would require Hilltop at its own expense, to produce each of those Cleveland witnesses at Seattle for further depositions (R. 2312). Meanwhile, the "freeze" order stayed further discovery pending rulings on Austin's motions. When the Court granted these motions (R.829-831), further antitrust discovery was rendered moot pending remand if this Court upholds the cross-appeal.

The Court found from Hilltop's Contentions that Smith's alleged objective was ". . . the suppression of potential competition to its Severance shopping center . . ." and that Hilltop was alleged to have conspired with Smith

" . . . in the general objective of restraining shopping center competition" (R.829).

It is for a jury to determine, regardless of Hilltop's lack of knowledge or participation, whether in fact Smith and Hilltop severally or jointly conspired to violate the Sherman Act with intent to preclude competition in regional shopping centers in eastern Cleveland, Flintkote Co. v. Lysfjord, 246 F.2d 537-5 (9th Cir. 1957), and whether it was reasonably foreseeable that Smith would cause Hilltop to "accept [Smith's] conclusion" (R.1212) and sell their property for other uses.

Hilltop submits that the orders dismissing its antitrust

ments should be reversed and remanded for jury trial on the merits; and a reasonable attorneys' fee should be awarded on this part of the Cross Appeal.

B. Smith Damaged Hilltop By Wilfully Concealing Vital Information Contained In Its Undelivered INTRODUCTION to the Nutwood Analysis. [Spec. of Errors Nos. 2, 7]

In exchange for Hilltop's \$2,920, Smith delivered an analysis dated January 8, 1960, entitled "Shopping Center Opportunities at Nutwood Farms" (Ex. 29). That was all. A three-page cover letter of January 7, 1960, was included as a part of the analysis. It contained the following statements:

". . . Competition, particularly in the department-store-type-merchandise categories is very substantial. (Emphasis in text).

". . .  
"The preceding factor is particularly responsible for the conclusions of our analysis with respect to Nutwood Farms . . .

\* \* \*

"In summary, our study indicates an absence of a sufficient volume potential to justify the interest of major tenants, and the absence of a sufficient investment opportunity to justify the development from the standpoint of the property owners."  
(Ex. 29, cover letter, pp. 1-2).

During the course of the pre-trial discovery, well after the commencement of this action, Hilltop was tendered certain work papers used in the preparation of the analysis, now designated as Exhibit 175. They include an "INTRODUCTION"\* (the bottom three pages on the right hand side of the Exhibit) marked "NOT USED IN REPORT" and "None of this used in rpt to client". That "Introduction" includes the following language:



" . . . we have undertaken the analysis of both . . . conventional department store business . . . and also the market for a store of unusual merchandising characteristics such as would be typified by Sears Roebuck or Montgomery Ward . . .

" . . . We find that virtually every significant department store operating in Cleveland has already undertaken a branch program in one form or another and that with the exception of Sterling-Lindner-Davis (Allied Stores) and Taylor's, there are no Cleveland stores not already represented in locations which would appear to compete with their own store on the Nutwood Farms site.

"One major store possibly interested in Cleveland but not now represented is Montgomery Ward. While Ward's are not now operating in any major way in the Cleveland area, some market we believe will exist for a Montgomery Ward store on the proposed site, and to that end we have attempted to define the extent of this opportunity specifically because Montgomery Ward appears to represent a logical choice for a key tenant." (Ex. 175, "Introduction", p. ii)

A comparison of Exhibit 29 with the undisclosed "Introduction" is revealing. Exhibit 29 does not point out, directly or indirectly, the market for a store such as Sears, Roebuck or Montgomery Ward; nor "that virtually every significant department store operating in Cleveland has already undertaken a branch program"; nor that Sterling-Lindner-Davis or Taylor's are the only exceptions; nor that Montgomery Ward was a "logical choice for a key tenant". (Ex. 175).

One entire section of the analysis, entitled the "Share-the-Market Approach", does, however, use extremely low percentage figures (5%, 10% and 15%) (Ex. 29, pp. 6-7), without explanation and without any reference to the material contained in the

disclosed "Introduction": The proposition that "virtually every significant department store operating in Cleveland has already undertaken a branch program" was, in fact, the sole reason that such low percentage figures were used in the "Share-the-Market Approach", according to Smith's witnesses, Treiger, Marshall and Kelly (Tr. 1567, 1676, 2199). But this was not disclosed in the analysis or, indeed, at all until after commencement of pretrial discovery (Tr. 2513-4).

Darmstadter, the field man who gathered the statistical information on which Exhibit 29 was based (Tr. 1713-13A, 1719-20), testified that the unused "Introduction" summarized the findings of Exhibit 29 in detail "with regard to . . . department stores", and that paragraphs from the "Introduction" noted above would have been valuable to Hilltop (Tr. 837-8). His testimony is undisputed and obvious.

The failure to provide either the "Introduction" or the material which the "Introduction" asserts to have been gathered constituted a deliberate withholding of material information relating directly to the contract between Hilltop and Smith. The analysis (Ex. 29) was therefore a breach of contract and a fraud on Hilltop, independent of Smith's concealment of its impending purchase of Severance, and equally independent of the accuracy of the statistical material which actually did find its way into Exhibit 29. The fact that these affirmative suggestions in the "Introduction" were not retained in the analysis (compare "the



competitive situation is rather severe", Ex. 175, p. ii, 9  
with "an absence of a sufficient volume potential to justify  
interest of major tenants", Ex. 29, cover letter, p. 2, 7  
peaches the objectivity or accuracy of the balance of Exh.

Why was the "Introduction" withheld? The decision was  
Treiger's (Tr. 1576). The report writer, Marshall, "was a  
more fearful of competition than Treiger was" (Tr. 1670).  
"Introduction" which Marshall drafted termed the competition  
"severe" but suggested that there were possibilities for com-  
ment store tenants at Nutwood. Yet Treiger's cover letter  
Exhibit 29, submitted in lieu of the "Introduction", stated  
the paragraphs noted above, that competition was so substan-  
as to indicate

" . . . an absence of a sufficient volume potential  
justify the interest of major tenants, and the absence  
of a sufficient investment opportunity to justify the  
development \* \* \*." (Ex. 29, cover letter, p. 2)

Thus, the man less fearful of competition overruled the man  
fearful of competition. On what basis? Competition! The  
claimed "severe" competition for Nutwood assumed that Severance  
would become a rival center (cf. R.1226). But now Smith  
claimed to have had only "in effect . . . an option" on  
Severance from February through July 1960 (Smith Op. Br. 13).

No one can reconstruct with certainty as of January 1960  
the precise effect on Nutwood of Smith's suppression of the  
"Introduction" (Ex. 175). But a tortfeasor may not use a

certainty as to exact damages proximately caused by willful fraud and breach of contract to defeat a victim's right to reasonably established damages, Locke v. United States, 283 U.S. 281 (Ct. Cl. 1960), and cases cited.

C. The Conclusions of the Nutwood Analysis (Ex. 29) Were Clearly Erroneous and Fraudulent. [Spec. of Errors Nos. 3, 7]

A thoughtful comparison of the Nutwood Analysis (Ex. 29) with the work papers upon which it is based and contemporary analyses by Smith of competing locations, including Severance, result in only one conclusion: The conclusions of the analysis were totally wrong.

There is no dispute as to Smith's methodology in analyzing the potential of a particular location for a regional shopping center (Tr. 2130-31). First, the analyst determines the "trade area" from which the center is expected to draw about 85% of its business (Tr. 952; Ex. 225, p. 1). This determination was one of judgment (Tr. 2341, R.1247) but Hilltop did not know this (Tr. 231, 345). Second, the population of the "trade area" is determined from official or semi-official sources for certain past years (in the case of the Nutwood Analysis 1950 and 1959) and projected forward to the years covered by the analysis on a simple straight line basis (Tr. 1553-4, 2140-5; Ex. 175). Those objections will be found in Exhibit 29, p. 2.

Next, per capita income is determined from official sources

(Tr. 1556, 2147-53). This information is also found in of the Analysis, but it is not projected forward to any years.

Following this, per capita spending figures for the particular types of stores under analysis are determined for same year (Tr. 2160-67). Those spending figures, times population, are used as "sales potential" for various types of stores (Tr. 1557). The latter information, for the Nutwood trade area, is found in tabular form on page 3 of the Analysis, but the per capita spending figures are not separately shown. The "sales potential" figures are thereafter reduced by a percentage figure which, it is assumed, will be spent in the central business district, and the result is known as "suburban share" (Ex. 29, pp. 3-4).

The next step, and a vital one in this Cross Appeal, is to subtract from "suburban share" a figure known as "effective competition", the result of which subtraction is a figure known as "unsatisfied sales potential" for each category of stores studied (Tr. 2131, 2170; Ex. 29, pp. 4-5). This ultimate figure is found on page 5 of the Nutwood Analysis. Most of the figures on that table indicate no "unsatisfied sales potential" for stores at Nutwood; in fact, the exercise in subtraction, if they were derived actually resulted in a negative figure.

It is because of the almost total absence of unsatisfied sales potential, especially for department stores, that the

clusions of the Analysis were completely negative (Ex. 29,

5; cover letter pp. 1-2).

The Nutwood Analysis does include major errors resulting from carelessness which also contributed to its negative conclusions. For example, Census Tract LC-4, located partly in the primary trade area of Nutwood and partly in its secondary B trade area, had an estimated 1970 population of 14,000, but only 298 of those people were actually used in connection with the Analysis (Tr. 2220). The correct figure, multiplied by per capita department store spending and reduced by the suburban share percentage, would have added \$1,400,000 to the department store suburban share figures for 1970, and a proportionate amount for 1962 and 1965 (Tr. 2219-2222).

By the same token, an admitted error in the Analysis in stating the Sears Store at Shoregate to be 70,000 square feet in size rather than 40,000 square feet, resulted in over estimating "total sales capacity" by \$2,100,000 and its "effective competition" within the Nutwood trade area by \$1,785,000 (Tr. 1207-2284-85).

Each of these errors rendered the conclusions of the Nutwood report substantially more negative than they should have been in admitting the accuracy of the Analysis in every other respect. But in spite of these grave errors, the falsity of the conclusions of the Nutwood Analysis is based almost exclusively on Smith's misuse of its own concept of "total sales capacity"



and "effective competition" in the report. It was for the reason that respondents' expert, Dr. Reinstra, accepted, for the purposes of Part I of Exhibit 330 only, the accuracy of practically everything else in the analysis for the purpose of his expert critique of its conclusions (Tr. 1145; Ex.

"Total sales capacity", as defined and used by Smith in Exhibits 29 and 225, is a precise estimate of the amount of business which will be done by existing or planned competitor stores after the construction of the facility under study, and "effective competition" is the portion of that business which Smith determines will be done within the trade area around the proposed facility (Nutwood) by the competitive stores during the dates covered in the analysis of the proposed facility. Once this position is accepted, the conclusion that the analysis was false is inevitable.

The accuracy of this proposition would seem to be almost self-evident, but beginning with pretrial discovery in this litigation, Smith witnesses attempted repeatedly to render the definition more fuzzy and less specific, and to change it from an estimate precise in time, nature and amount to a highly generalized, vague concept, wholly inapplicable to any specific date (Tr. 1013-4, 1323-4, 2715, 2175-6, 2364-7). The reason for the attempt is obvious. If "effective competition" is a precise estimate, applicable to specific dates, of the amount of business which will be done within the trade area



regional shopping center at Nutwood, it is a representation of fact. If that representation is false, the error constitutes either a separate and additional fraud or a separate and additional breach of contract. If the representation is knowingly false, or is made with reckless indifference to its truth or falsity, it is fraudulent; if it is simply the result of negligence or carelessness, it constitutes a breach of contract. In either event, it is such a vital element that its falsity would invalidate the entire report, and especially the negative conclusion as to the potential of Nutwood as a regional shopping center. This Court may come to that conclusion from the Analysis and its workpapers and depositions alone; it does not involve a challenge to the credibility of any witness who testified in person at trial.

If, on the other hand, "effective competition" is a vague, generalized concept, unrelated to any specific date or time and equally unrelated to the amount of business which a given competitive facility may generate, it is much more difficult, of course, to attack it as a material misrepresentation, though it is equally difficult to determine what it is good for in a shopping center analysis.

In order to determine whether or not Exhibit 29 contains material misrepresentations of fact, this Court must decide what "effective competition" means in that Analysis.

Exhibit 29, as delivered to Hilltop in January 1960, contains definitions of both "total sales capacity" and "effective competition". These definitions were physically included in Exhibit 29 as delivered to Hilltop but are also separately included in the record as Exhibit 225. The definitions read as follows:

"Total Sales Capacity - Capacity as used throughout this report refers to the estimated amount of sales volume that existing retail facilities are capable of obtaining and holding under normal competitive conditions when adequate facilities with competent management are available to customers. In no way does the use of the term connote maximum physical capacity of given plant to obtain a given volume. It is, rather, an estimate of the amount of business that would be expected to be retained by existing stores in the face of competition from new facilities when customers are free to choose from a wide variety of stores.

"Effectiveness - Effectiveness refers to that portion of the total sales capacity of a competitive unit or group of stores which the unit or group obtains from within the subject trade area. This term refers to the estimated effect which existing competitive facilities will have in the subject trade area after the proposed shopping center is constructed." (Emphasis in text)

The terms "effectiveness" and "effective competition" are synonymous (Tr. 802-3).

At page 18 of Exhibit 143, a 1961 market analysis of Severance, prepared by Smith, the term "effective competition" is defined in almost identical fashion:

"This figure represents the volume which these competitive facilities would probably continue to obtain within the Severance Center trade area, even after development of Severance Center and, hence, represents volume which would not be available to the facilities at Severance Center."

Appellants' witness, Mr. Marshall, actually determined the total sales capacity" and "effective competition" figures in Exhibit 176, which were used in Exhibit 29 (Tr. 1667-9). He testified that "effective competition" is an estimate of the amount of sales which will be drawn from the trade area of the facility under study by a competing facility after construction of that facility on the dates to which the study is directed (Tr. 890-1, 1692-3, 1695-97). This is entirely consistent with the definitions found in Exhibit 29.

For an illustration of Smith's witnesses' inconsistency in defining the crucial concept of "effective competition", compare the written definition contained in the appendix to Exhibit 29, and the testimony of Messrs. Marshall and Steichen at Tr. 890-1, 898-940, 1003-4, 1692-93, 1695-97 with the testimony of Messrs. Greiger, Steichen, Smith and Kelly at Tr. 1013-14, 1323-24, 2715, 2775-76, 2364-67.

Further confirmation, if any is needed, of the fact that "total sales capacity", as that phrase is used by Smith, is Smith's best estimate of the business which a given facility will actually do on a fixed date in the future will be found by comparing the "total sales capacity" used for Severance Center in connection with the Nutwood analysis with Smith's projections of the business Severance would do in its studies of Severance, and then with the actual performance of the department stores in Severance Center.



In Exhibit 176, some of the work papers for the Nutwood analysis, the "total sales capacity" for department stores Severance Center was determined to be \$22,800,000 (Ex. 176, item 38). In Exhibit 11, an analysis of Severance Center in connection with the promotion of Severance by Smith, we that Severance's share of "unsatisfied department store potential" in 1975 will be \$24,481,000 (Ex. 11, p. 21). Finally Larry Smith himself, with justifiable pride, stated that the figure was within one per cent of actual department store at Severance Center for the year ending January 31, 1965 (2374-75).

"Total sales capacity" is clearly a prediction of actual business at a future date, and "effective competition" the prediction of that business anticipated from a given area. It goes without saying that Smith may not vary its definitions of the key phrases "total sales capacity" and "effective competition" after the fact in order to defend this lawsuit. In the case of any inconsistency, Smith's written definitions and the actual use of the concepts by Mr. Marshall, the report writer, must govern.

The use of these concepts in the Nutwood Analysis is relatively simple. In Exhibit 29, the Nutwood Analysis, the "effective competition" of department stores competitive in the Nutwood trade area was stated to be in the very precise of \$41,255,000 (Ex. 29, p. 4). This figure is applicable

specifically to each of the years covered by the report - 1962, 1965 and 1970 (Ex. 29, p. 5; Tr. 1695-97). Clearly this means that the residents of the Nutwood trade area are expected to do \$41,255,000 worth of business in suburban department stores competitive within that trade area in 1962, exactly the same amount in 1965, and the same amount again in 1970.

The population of the trade area would, of course, increase markedly during that period of time (Ex. 29, p. 2).

Exhibit 29 also asserts as a fact that the total "suburban share" of department store spending within the Nutwood trade area in 1962 will be in the very precise amount of \$28,010,000 (Ex. 29, p. 4).

"Effective competition", as it is defined in Exhibit 29's appendix (Ex. 225), as well as by Mr. Marshall, could not under any circumstances exceed "suburban share", in theory or in practice, since "suburban share" is the total of all retail expenditures in a given category of stores spent in suburban stores, and "effective competition" is the amount of business retained by stores in those categories in the trade area of the suburban facility under study after its construction (Tr. 2130-31; Ex. 29, p. 4; appendix p. 2). Thus, either Smith's "effective competition" figure of \$41,255,000 or its "suburban share" figure of \$28,010,000, or both, is in error. Mr. Treiger, the account executive on the job, could not have failed to notice an error of such magnitude. Moreover, the \$41,255,000 figure makes no



allowance for any department store built at Nutwood itself, though its existence was assumed in connection with the preparation of the report.

It is particularly significant that in both the Primary and Secondary A portions of the Nutwood trade area, both of which are either entirely or almost entirely located within the Severance trade area (Ex. 344-E), the "effective competition" facilities in existence in 1960 is almost identical to the "suburban shares" for those areas, without considering Severance. In the case of the Primary trade area, the 1962 department store "suburban share" is shown as \$5,772,000, while Ex. 176 shows the "effective competition" of \$5,637,000, Severance excluded. In the Secondary A area, the "suburban share" for 1962 is \$7,000,000 and the "effective competition", excluding Severance, is \$7,079,000 (Ex. 29, p. 4; Ex. 176; Tr. 1158-1160).

By definition, when Severance itself was added to the formula, the "effective competition" of the other department stores should have been lessened, because the other stores could not "retain" as much business, and all of the suburban stores together could not "retain" more than the total "suburban share" (Tr. 1158-60, 2238-45).

By like measure, the assumption of a major department store in a regional shopping center at Nutwood should further have lessened the estimates of "effective competition" for the other stores, including those at Severance.

in point of fact, Smith did neither.

It would thus appear that Mr. Marshall erred seriously in his determination of the "total sales capacity" or the "effective competition" figures, or both, reported in Exhibit 176 and applied to the trade area of Nutwood in Exhibit 29.

These errors may have been due to his lack of experience in the Cleveland metropolitan area, but that lack of experience provides no legal excuse for Smith, which assigned him to the job. Mr. Tierney was not assigned the job, though he had just completed the Severance re-analysis (see Ex. 209 A). Mr. Treiger was account executive on both the Severance job and the Nutwood job. He knew Cleveland well. He supervised and corrected Mr. Marshall's work and could not have failed to notice the substantial errors in that work. Since those factual errors were carried into Exhibit 29, they constitute a misrepresentation of fact by Smith. Significantly, after plaintiffs rested their case, Smith did not call Mr. Treiger to explain or justify his approval and revision of these figures.

The errors in Exhibits 176 and 29 become even more apparent when one studies individual facilities.

First, as to Severance, Exhibit 176, item 38, indicates it to be 50% effective within the Nutwood trade area, or \$11,400,000.

Mr. Marshall testified specifically that these "effective competition" figures for Severance within the Nutwood trade area related to the year 1962 (Tr. 1695-97). He also testified that

the percentage of "effective competition" from Severance with the Nutwood trade area would be lower than the percentage of the population of the trade area of Severance contained in that "overlap" area because the per capita income of the "overlap" area was lower than that of the balance of the Severance trade area (Tr. 1697-98).

In fact, the 1962 population of that overlap area, based on the population figures used by Mr. Marshall, was 34.8% of the total population of the Severance trade area, and not 50% (Ex. 372). Thus Mr. Marshall himself could not possibly have come up with an effective competition percentage for 1962 in excess of 30%, and probably should have used a lower figure because of the substantial differences in per capita income (Tr. 1691-93, 1697-98).

Even 30% is too high if one considers factors such as (1) the relative distance from Severance to the "overlap" area, (2) the effect of the competitive facilities (including Nutwood itself) within the "overlap" area, and (3) the fact that the northern and eastern boundaries of the Severance trade area shown in Exhibit 344E would necessarily be compressed by the existence of another regional shopping center at Nutwood (Tr. 1669).

None of these factors was considered by Mr. Marshall (Tr. 1668-69, 1690-1701, 1707-1711).

In spite of these factors, and in spite even of the factors considered in Mr. Marshall's methodology, he nevertheless

n assigning a 50% "effective competition" figure to Severance,  
r \$11,400,000, and that figure was accepted by Mr. Treiger  
Ex. 176, item 38).

With far less excuse, Mr. Kelly, a Smith partner and one  
f its expert witnesses, fell into the same error that evi-  
ently actuated Mr. Marshall in his determination of the "ef-  
ective competition" of Severance in the Nutwood trade area.

In his pretrial direct testimony, defendant Kelly testified  
that the 50% "effective competition" figure used in Exhibit 176  
as more reasonable than that arrived at by plaintiffs' economic  
xperts, Messrs. Ward and Reinstra,

" \* \* \* in view of the population percentages  
[for the overlap] which admittedly in the earlier  
years will be less than 50% and which by 1970 and  
1980 should increase to more than 50% [of the  
Severance trade area population]." (Tr. 2188).

In fact, that population would not reach the 50% figure  
laimed by Mr. Kelly on the straight line basis used by Smith  
ntil some time after 1990 [1962 equals 34.8%; 1970 equals  
3.7%; 1990+ equals 50% (Ex. 372, p. 1; see also Tr. 2245-  
254)]. The "effective competition" figures used in the prep-  
ation of the Nutwood Analysis are not only unreasonable but  
ossible.

The nature and extent of this error can perhaps best be  
illustrated by the following table:



EFFECTIVE COMPETITION WITHIN THE  
NUTWOOD TRADE AREA (Tertiary excluded)\*

(All \$ figures are per capita)

	<u>Primary</u>	<u>Secondary A</u>	<u>Secondary B</u>
1. Suburban share	- \$104	\$108	\$ 93
2. Severance effective competition	- \$ 55 -65	\$ 88	\$ 58
3. Severance effective competition as a percentage of suburban share	- 53-63%	81%	59%
4. All effective competition except Severance	- \$102	\$108	\$120
5. Total effective competition	- \$157-167	\$196	\$178
6. Total effective competition as a percentage of suburban share	- 151-161%	181%	182%
7. Nutwood share	- -0-	-0-	-0-

\*The source of the "suburban share" figures is the department store "suburban shares" on page 3 of Exhibit 29, divided by population figures on page 2. Each zone is figured separately. This material may also be found in or derived from Ex. 175. The source of the Severance "effective competition" figures is the dollars of "effective competition" shown in Exhibit 176 divided by the populations shown in Exhibit 372; the reason for the range in the primary zone is that Exhibit 372 shows the population of that zone both with and without the error in Census Tract LC4 found in Exhibit 175 and used in Exhibit 29. The source of all other "effective competition" figures is the dollars of "effective competition" found in Exhibit 176 divided by the populations shown on page 2 of Exhibit 29. Item 5 is the total of Items 2 and 4. Item 6 is the Nutwood share shown on Exhibit 29, page 5.



The preceding table shows graphically that the entire "suburban share" in Nutwood's Primary and Secondary A trade zones was taken up by the "effective competition" of facilities other than Severance, but that nevertheless Severance was expected to receive department store business from those zones of between 3% and 81% of the entire "suburban share" in that portion of each of the zones which was also in the Severance trade area.

On its face it is impossible for Severance and its competition to do a department store business in these areas of over 100%, i.e. between 151% and 182% of the entire "suburban share" of the department store business available there, when "suburban share" is, by definition, all of the available business.

The "effective competition" attributed to Cedar Center within the trade area of Nutwood in Exhibit 176, as carried over to Exhibit 29, constitutes an equally serious misrepresentation of fact.

First, there are no statistics, including Smith's own license plate study of Cedar Center taken before the construction of Severance, supporting the 38% figure asserted as fact in Exhibit 176. Mr. Marshall's methodology, if properly utilized, would have resulted in a figure lower than the 15.9% shown in Exhibit 369 as the proportion of the 1962 population of the Cedar Center trade area (as shown in Ex. 105) overlapping the Nutwood trade area (Tr. 1692-94). On a straight-line projection, that percentage would not reach 38% until the year 2010 [1960 equals

15.9% figure, using Mr. Marshall's methodology, would further be reduced to reflect the fact that the people in the "over area" had a lower per capita income than those in the balance of the Cedar Center trade area (Tr. 1692-94).

Mr. Marshall's method of determining "effective competition" was to consider the population of the portion of the trade area of the competing facility which was also within that of the facility under study as a percentage of the population of the trade area of the competing facility, with an increase or decrease in the resulting percentage to account for their relative per capita incomes (Tr. 1691-1701).

A final illustration, this one dealing with the concept of "total sales capacity", will show the cavalier attitude with which Smith treated that concept and "effective competition" in preparing the Nutwood Analysis.

Because Smith's primary methodology showed no "significant residual potential" for a department store at Nutwood, it used a second method, called the "share of the market" approach (Ex. 29, p. 6). That approach indicates that a department store at Nutwood would do \$2,801,000 worth of business in 1962 (Ex. 29, p. 6).

The assumption upon which the analysis of Nutwood was based was that its department store would be a "normal" or a "seasonal" store (job order, Ex. 175, right hand side, fourth page of

tion). Its size would be approximately 150,000 square feet

Tr. 1330-31, 1588; Ex. 29, p. 7; appendix, p. 1).

But for some unexplained reason, while a 150,000 square foot Sears store at Nutwood would do \$2,801,000 worth of business in 1962, the 40,000 square foot Sears store at Shoregate, located in the heart of the Nutwood trade area and thus appealing to exactly the same category of customers, had a "total sales capacity" of \$2,800,000 [40,000 x \$70 per square foot] (Tr. 894-896, 1207-9, 1586-89, 1686, 2284-85), representing, to quote from the definition of "total sales capacity" contained in Exhibit 29, appendix, p. 2, "the amount of business that would be expected to be retained by [the Sears store at Shoregate] in the face of competition from new facilities [a Sears store at Nutwood]".

If these factual errors and misstatements had been corrected, Exhibit 29 would have been at least as favorable as Dr. Weinstra's Part I of Exhibit 330 as to the potential of Nutwood as a regional shopping center in 1962, 1965 and 1970. Taken together, the errors and misstatements changed what should have been a favorable report on a regional shopping center at Nutwood, potentially seriously competitive with that at Severance, into a report the conclusions of which were totally negative. The responsibility for these errors can be laid at the doorstep of J. Treiger, the account executive who undertook the job and the only person connected with it who had any experience in Cleveland,

and to those partners who should have or did review his work

Smith's attitude toward Hilltop as a client is shown dramatically by the so-called "substantiating" report (Ex. 10)

After Hilltop discovered Smith's undisclosed conflict of interest in July, 1960 (R. 1244-45, 1248), and refused to accept Mr. Treiger's deceptive apologia the next month (R. 1246-47), Smith ordered that the original analysis be "substantiated" (Ex. 54). Such a report, without consideration or even the knowledge of the client, was unprecedented (Tr. 684, 1812-13)

The "substantiating" report, dated December 15, 1960, was delivered to Hilltop during the course of a conference involving Cleveland counsel for both sides on February 15, 1961 (Tr. 2647; R. 1249). It purports to confirm the conclusion of the original Nutwood Analysis. In fact, it is a collection of misrepresentations from beginning to end.

Exhibit 10 begins with a graphic series of overlays comparing the size of the Nutwood trade area with those of four regional shopping centers in other parts of the country (Ex. 10 pp. 1-4). The text includes the statement:

"The trade areas as illustrated have been constructed from the collected customer location data to include 85% of the total customer sample" (Ex. 10, p. 1).

In fact, each of the comparative trade areas is so compressed as to include a maximum of 82.8% of the customers in one area and down to a minimum of 65% in another (Tr. 951-956, 959-961)

965, 971, 1264-65, Ex. 147, 150) and in the case of only



the four trade areas compared with Nutwood located in area of similar population density, almost half of the physical extent of the trade area is omitted (Tr. 965-966, 972-973; Ex. 147).

The comparisons are therefore not only worthless, but deceptive and misleading.

Page 11 of the "substantiating" report, Ex. 10, asserts the effect of Severance on "effective competition" within the Nutwood trade area to be the difference between the \$41,255,000 found in Exhibit 29 at page 4 and \$33,000,000, or \$8,255,000. In fact, the actual figure used by Smith was considerably higher:

\$1,400,000 (Ex. 176, item 38). Smith couples this misrepresentation with the assertion on page 12 of the "substantiating" report that the effect of Severance on Nutwood was "limited", when in fact it was overwhelming, almost twice as much as the next most important competing facility. (Compare the map facing p. 12 of Ex. 10 with Ex. 344E; Ex. 344, p. 23).

The "substantiating" report shows the extent to which Smith was prepared to go four years before trial in covering its tracks and preserving its interest in Severance.

Hilltop does not contend that a positive report would have rendered certain development of a regional shopping center at Nutwood, but it does contend that it would have rendered it much more likely and that that change alone would have substantially increased the value of Nutwood. The effect of a favorable report by Smith on value, including Smith's own views on that



subject, is discussed at length in this brief at pages 58-6

It should be remembered that Exhibit 29 is not negative its conclusions because of any critical commentary on the Nutwood site, but solely because of the "effective competition" within the trade area of Nutwood (Ex. 29, cover letter, pp. 3 and 4). In that trade area, since 1960, five substantial department stores and two major regional shopping centers -- Great Lakes Mall and Richmond Mall -- have been built or are under construction (R. 1456). Even in the face of this tremendous increase in facilities, Smith's independent expert, Mr. Roebuck, with his conservative approach, found considerable potential for Nutwood in 1970 (Tr. 1914-19, 1947-1960). Obviously the trade area provided a great deal brighter future in 1960 before anyone had thought of Richmond Mall as a shopping center and at a time at which Great Lakes Mall was less developed and was behind Nutwood in the stage of its development.

The fact that Smith's statements of fact as to "effective competition", and the resulting conclusions as to the lack of potential of Nutwood as a regional shopping center, are in the form of predictions based upon facts and conditions existing at the date of the analysis, does not render them less valuable to challenge as being fraudulent. As summarized in Jurisprudence 2d, 644 - 645, Fraud and Deceit, §35:

"Liability in tort for fraud is imposed upon one who is employed to advise upon matters within the scope of his professional capacity, and who expresses an

opinion known by him not to be true. Knowledge of the falsity of his opinion is not requisite, however, in order to hold him liable in damages; for where his duty is to present correct statements and give sound advice, it is futile to say that he is not liable because the matter of advice would, except for his professional employment, be regarded as mere opinion."

recent Ohio Supreme Court is in accord, Pumphrey v. Quillen, 55 Ohio St. 343, 135 N.E.2d 328 (1956). It quoted Parmlee v. Dolph, 28 Ohio St. 10, 21 (1875), with approval:

"Where a party, from the nature of the transaction and his relation to the parties and the facts are such that he is chargeable with a knowledge of the truth of the representations he makes, if they are false, he cannot escape liability by saying he believed them to be true. It was his duty to know whether they were true, and his belief will not excuse him from liability to the person injured thereby, unless the facts will reasonably justify a prudent man in such belief."

The negative conclusion of Smith's analysis of Nutwood was due to misstatements of fact as to department store "total sales capacity" and "effective competition" within the Nutwood trade area, derived in accordance with Smith's own methodology. It is thus no defense for Smith now to claim (1) that the statements were mere expressions of opinion rather than statements of fact, (2) that the statements represented Smith's opinion at the time, (3) that its conclusions can be justified on other grounds.

D. Nutwood Had Excellent Potential as a Regional Shopping Center Site in January, 1960. [Spec. of Errors Nos. 3, 4]

The preceding section demonstrated that the conclusions of the Nutwood analysis (Ex. 29) were false based on Smith's own

methodology and on his own premises. This section will show that the conclusions of every other expert show that Nutwood had excellent potential as a regional shopping center in January 1960. It will discuss, in turn, Hilltop's experts, Dr. Reid and Mr. Ward, Smith's own criteria as set forth in his book Shopping Towns U.S.A., and Smith's expert, for the purposes of the trial, Mr. Roebuck.

Reinstra and Ward dealt with Nutwood's potential in two ways, first by accepting the accuracy of all of the defense portions of Exhibit 29, attacking Smith's figures only as to effective competition and per capita spending, and, second, starting afresh with the Smith methodology but doing their own analysis (Ex. 330, Parts I & II). Both methods show a considerable potential for Nutwood as of January, 1960.

Next, Larry Smith himself authored a book on shopping centers, entitled Shopping Towns U.S.A. (Ex. 368) which was published in 1959. On page 38 of that book Larry Smith listed eleven requirements for a regional shopping center: (Ex. 368)

- "1) The site must be located in the general area established as most desirable by the economic survey.
- "2) It must be owned or controlled by the developer, and its acquisition must be feasible.
- "3) The cost of the land must be in keeping with overall economic considerations.
- "4) Existing zoning must permit usage of the site for shopping center purposes, or there must be a reasonable likelihood that rezoning can be achieved.

- "5) There must be enough land to allow construction of facilities that will meet the sales potential.
- "6) The shape of the site must be such that advantageous planning is feasible.
- "7) The land must be in one piece, free of intervening roadways, rights-of-way, easements, or major waterways, etc. that would force development in separated portions.
- "8) Physical characteristics of the land must permit advantageous planning and reasonably economical construction.
- "9) The surrounding road pattern and the accessibility of the land must allow the full utilization of the business potential of the projected center.
- "10) The possibility of achieving visibility of the shopping center structure from major thoroughfares must be present.
- "11) Surrounding land uses should be compatible with the operation, free of competitive developments; and should, if possible, offer contributing and enhancing characteristics."

Larry Smith, as an author, states that only rarely will an investigated site completely fulfill all the requirements listed above (Ex. 368, p. 38). Nutwood fulfilled all of them. Smith never questioned any except No. 1, based on its own economic analysis, and No. 4, zoning potentials. Thus only these will be discussed in this brief.

Smith's studies of Severance divided suburban Cleveland into four areas. Smith found what it called "Area I" to be far the most desirable:

"The analysis . . . clearly indicates that the maximum department store opportunities within the Cleveland metropolitan area exist in suburban area I, as defined. Further growth will, in fact, accentuate the opportunities in this area." (Ex. 106, p. 25).



Smith's map of Area I shows that Nutwood is as close to center as Severance (Ex. 106, following p. 6).

After inspecting the Nutwood site, Treiger's reading of memo reported it was "in a pretty strategic location" (R. 1 and Smith confirmed that the potential for suburban facilities in Nutwood's trade area was "very significant" (Ex. 29, cover letter p. 1).

Finally, on January 8, 1960, there was only one senior department store in all of Area I, the May Company store at Center (R. 1158).

History has proved that Smith was right in its analysis of Area I. Despite Smith's fraud and antitrust goals which emanated Nutwood as a regional shopping center site, two department stores, in addition to those at Severance, have been built or under construction at Great Lakes Mall and Richmond Mall; and numerous discount department stores have also been built within the Nutwood trade area since Smith's negative report on Nutwood of January 1960 (R. 1456). Smith intended to dominate Area I itself to enhance its investment in Severance to as great an extent as possible.

The only other requirement for a regional shopping center listed by Larry Smith in Shopping Towns U.S.A., the absence of which from Nutwood is claimed by Smith, is number four, relating to zoning.

In 1960, Nutwood was zoned for residential uses. In 1961



the owners had sold Nutwood, portions of the site were rezoned to permit shopping center development (Ex. 328). That action is perhaps the best possible evidence that such a rezoning was reasonably likely in January, 1960.

"The question of the existence of a reasonable probability of an imminent change in zoning is a question of fact . . . . The fact that subsequent to the taking the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence at the time of the taking of the fact that there was a reasonable probability of an imminent change."

4 Nichols on Eminent Domain 251, §12.322 [2].

The testimony of Mrs. Tyler and Mr. Fenton and the minutes of the meetings of the councils of Willoughby Hills and Wickliffe were introduced not to prove the rezoning but prove its reasonable likelihood during the time that the Winslow sisters owned Nutwood. Exhibit 201-9, especially, shows the receptivity of the Willoughby Hills village council toward the necessary rezoning, and Mrs. Tyler explained that such rezonings were not actually accomplished until a developer presented a specific plan (Tr. 305-307). Willoughby Hills was serious enough about the development in 1959 to condition its consent to the Euclid Spur on the construction of access ramps to Nutwood (Ex. 201-4; see also Ex. 334, pp. 4a-5).

Thus Larry Smith was an expert witness for Hilltop. So was Smith's outside expert, Mr. Roebuck.

Mr. Roebuck found a 1970 potential for Nutwood of some 36,000 square feet of convenience and shopping goods stores,

after having discounted that figure to reflect every competing development built, or even begun, between 1960 and 1965, such as Richmond Mall, Great Lakes Mall, and the new discount department stores (Tr. 1966-1970). This 286,000 square feet amount to somewhat more than half the space required for what Roebuck defined on direct examination to be a "regional" shopping center (Tr. 1913). 286,000 square feet is, however, considerably less space than that found in six of the ten "regional" shopping centers studied in his report, "Suburban Business Centers" (Ex. 209B): Lee and Harvard; Pearl and Brookpark; Shaker Square and Detroit and Warren; Eastgate; and Southgate; (Ex. 209B, p. 10, Tr. 1955-59). Thus in 1960 Roebuck's definition of a regional shopping center exceeded the space he found in 1965 as potentially required for Nutwood in 1970.

Even more important is the impact of the competing centers coming into existence between 1960 and 1965 on Roebuck's 286,000 square foot finding (Tr. 1966-1970). If that competition had been excluded, Roebuck's report would have been vastly more favorable to Nutwood (Tr. 1966-1970). Such a finding would, of course, have been totally consistent with Roebuck's 1960 finding in Exhibit 209B, as three relatively small areas (when compared with the entire Nutwood trade area) in Northeastern Cuyahoga County, denominated E-5, NE-1 and NE-2, in Exhibit 209B, would have required some 600,000 square feet of additional shopping center space by 1970, even on the basis of Roebuck's conservative

In June 1959 Messrs. Petti and Crume met Roebuck, Mr. Noyes, the director of the regional planning commission study (Ex. 209B, p. 1), and Mr. Crandall, who was both a study staff member (Ex. 209B, p. 1) and an official of the Wickcliffe planning commission (Ex. 202). They were encouraged by them to seek rezoning of Nutwood promptly because of the need for shopping center expansion in the Nutwood area (R. 1182-83). The minutes of the Wickcliffe planning commission for July 22, 1959, (Ex. 202-2), report that:

"Mr. Crandall stated that a survey of business areas around Cleveland had disclosed a need for a shopping center in this area but not as large as proposed."

At that time, Hilltop was proposing in the neighborhood of 1,000,000 square feet of stores (Ex. 348B, p. 2).

Clearly Roebuck and his associates not only would have found, but did find, sufficient potential for a regional shopping center at Nutwood in 1960. Thus, had Roebuck directed his testimony as an expert at the year 1960, he would have presented a feasibility report for Nutwood at least as favorable as that of Rinstra and Ward. But even his 1965 report was radically more favorable than Smith's analysis of Nutwood and would have been very helpful had it been available to Nutwood in 1960. Smith was given a draft in August 1959 of Roebuck's report on shopping center opportunities in eastern Cleveland (R. 1181); but Demstadter, who made the Nutwood field report in December 1959,

him (Tr. 1723).

Since 1960 two regional shopping centers have been built in the Nutwood Farms trade area in addition to Severance. This has obvious disadvantages when compared with Nutwood (Tr. 66, 1377-1382; R. 1456).

It is of course impossible to say exactly what would have happened had the 1960 Smith analysis truthfully indicated the substantial potential for a regional shopping center at Nutwood. To the extent, however, that one must reconstruct the past, the necessity is occasioned by Smith's fraud in not disclosing the pending purchase of Severance and by the factual misstatements contained in Smith's analysis (Ex. 29). Smith cannot take advantage of its own fraud to claim the benefit of any such degree of certainty. See Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S.Ct. 574, 90 L. Ed. 652 (1946).

E. The Value of Nutwood in January, 1960,  
Was \$2,500,000. [Spec. of Errors 4, 5 and 6]

The trial court rejected the opinion of Hilltop's expert appraiser on the ground that it was "predicated somewhat on hindsight", and on comparable sales which the court was unable to accept as probative of the value of Nutwood Farms (R. 147). As a result, it found Hilltop's damage claims, insofar as they related to the value of Nutwood, to be speculative (R. 149). Its opinion did not specify any particular comparable sales.



an unacceptable nor what matters were "hindsight".

Any appraisal is, of course, inherently speculative to a degree. In United States v. 64.10 Acres of Land, 362 F. 2d 660, 68 (3 Cir., 1966), the court held:

"All opinion evidence of market value is to some extent inherently speculative . . ., for it seeks to describe in the form of a realistic event what is a theoretical construction, - something which in fact did not occur."

It held, however, that a properly trained and experienced appraiser could properly familiarize himself retrospectively with the data necessary to form an expert opinion, and that such an opinion so qualified must be received in evidence.

Moreover, an appraiser is justified in using, as comparable sales, sales of real property taking place after the date at which the valuation of the real property in question is directed. United States v. 63.04 Acres of Land, 245 F. 2d 140, 144 (2d Cir. 1957); 32 CJS, Evidence, §593(3), note 93.10, p. 737.

On January 8, 1960, Hilltop received Smith's analysis of the land. That analysis, as the trial court found, was worthless because Smith fraudulently concealed from Hilltop an overwhelming conflict of interest - its imminent ownership interest in the land - in securing the assignment to make the analysis. Its analysis was also fraudulent because its conclusions were false. (See infra, pp. 31-51).

At that point, and because of those frauds, the history of the land changed course. Shortly thereafter, the land was sold



for a price and under circumstances which would not have obtained in the absence of the analysis (see Hilltop's concurring Answering Brief, pp. 28-36). What the value of the land would have been on January 3, 1960, had the analysis been positive in its conclusions, or what the history of the land would have had it been retained by the Winslow sisters, is, of course, not certain because, to paraphrase the court in United States v. 64.10 Acres of Land, supra, a favorable analysis of Nutwood from an unbiased expert "is a theoretical construction, - a thing which in fact did not occur."

But Smith may not escape liability by reason of an uncertainty which it created. As the court stated in Locke v. United States, 283 F.2d 521, 524 (Ct. Cl., 1960):

"The defendant further takes the position that . . . the amount [of damages] is too speculative . . . But the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Bigelow et al v. RKO Radio Pictures, 327 U.S. 251, 265, 66 S. Ct. 574, 90 L.Ed. 652. Difficulty of ascertainment is not to be confused with right of recovery. Nor does it exonerate the defendant that his misconduct, which has made necessary the inquiry into the question of harm, renders that inquiry difficult. Eastman Kodak Co. v. Southern Photo Materials Co., 233 U.S. 359, 379, 47 S. Ct. 400, 71 L.Ed. 684. The defendant . . . should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable. Crichfield v. Julia, 218 F. 147, 65. . . . [T]he plaintiff must . . . establish that he has sustained some injury . . . Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 560, 50 S. 248, 75 L.Ed. 544.

"If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not be

"Any other rule would enable the wrongdoer to profit . . . at the expense of his victim. It would be an inducement to make wrongdoing so effective . . . as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply [this rule] would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' Bigelow v. RKO Radio Pictures, supra, 327 U.S. at page 264, 66 S.Ct. at page 580."

22 Am. Jur. 2d, Damages, §25, summarizes the law:

". . . all that can be required is that the evidence - with such certainty as the nature of the particular case may permit - lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss."

Washington law is in accord. Wenzler & Ward, etc. Co. v. Sellen, 3 Wn.2d 96, 98, 330 P.2d 1068 (1958).

Because Nutwood was not sold as a regional shopping center site, and because an analysis which should have been positive was negative, it is impossible to reconstruct precisely what would have happened to Nutwood in the absence of Smith's frauds. Nevertheless, there is almost complete unanimity as to the value of a potential regional shopping center site.

Hilltop's expert, Mr. Fenton, testified as to the development and progression of value of a regional shopping center site as follows:

"In my opinion, these sales indicate a pattern that is usually seen in the transition from rural

land to a finished and operating shopping center. As the land falls into a population pattern that indicates that it is . . . to become useful for other than residential or farming purposes, the market begins to buy it . . . for its future growth. As the idea of a shopping center comes more clearly into focus, with the growth of the neighborhood . . . this value continues to increase in the . . . market. . . . [W]hen . . . the market . . . believes a shopping center is feasible in the near future and will be successful, it begins to reach a value, as shown typically in . . . [t]he February 10, 1959 sale of one quarter of the stock of . . . Severance for \$750,000]. The value . . . continues to increase as the certainty of . . . a shopping center increases so that when leases are . . . signed and its construction seems well assured, the value is pretty well illustrated by . . . [the sale of Severance to Smith on February 10, 1960, for \$4,000,000 plus].

"The final stage in the growth of a shopping center value takes place when the center is constructed and the shoppers are in the stores, at which time it may go to \$1.00 a square foot [\$43,560 per acre] and substantially higher." [Tr. 1374-75].

Mr. Fenton's final conclusion as to the value of Nutco January 8, 1960 (Ex. 334-A, p. 9), was approximately \$2,500 per acre, with the shopping center land evaluated at \$17,500 per acre and the balance at \$5,000 per acre. His views are remarkably similar to those of Larry Smith. On January 28, 1959, Smith wrote a memorandum on Severance which reads, in part, as follows:

"We have, within the last six months, sold two such undeveloped properties at prices between \$1,250,000 and \$1,750,000. In neither case do we believe the quality equal to yours. There is, however, an increasing reluctance as the price reaches a total amount of \$1,750,000 for land alone, or a price in excess of \$30,000 per acre for shopping center land.

"The apartment land is not worth as much as the commercially zoned, and the net fringe commercial land after allowance for landscaping and interchange



parking is about 45 acres. \* \* \*

"We would not be interested in trying to set up a deal at the maximum figure outlined above, [\$3,200,000] but we would at say \$2,750,000. \* \* \*

"This, of course, reflects our opinion that it is sometimes possible to find a buyer willing to pay more than our opinion of the actual value of a property, and our feeling that everything considered a buyer would have to acquire the property at approximately \$2,750,000 to justify the profit which would be comparable to other opportunities currently available - although all prospective buyers might not be acquainted with those competitive opportunities." (R. 1151).

Nevertheless, after the department store leases were signed, Smith paid \$4,000,000 (R. 1225-26).

Similarly, on June 11, 1957, Treiger wrote:

". . . if Halle Company could get a competing site within this area, it would be very dangerous to allow them to go ahead from both Halle's standpoint as well as from the development standpoint. Everybody . . . [was] united in the opinion that acquiring property like this . . . would be impossible. Larry . . . thought [it] would be reasonable for a desperate store to pay as much as \$2,000,000 for property, just to get a location in order to maintain a strategic position in this very important market. Everybody [commented] that even at that price, [it] would be difficult to acquire enough property and to get it zoned." (R. 1120)

Thus Smith felt that a regional shopping center in the Severance area competitive with Severance would be worth some \$2,000,000 in 1957, even though not zoned for shopping center purposes.

An illustration of the growth and value of property for shopping center purposes, depending on the closeness of the actual shopping development or its likelihood, finds a perfect example in the various Severance sales discussed in the admitted

facts and in Mr. Fenton's testimony. The first sale of Severance was that of three quarters of the stock of the corporation owning the property for \$750,000 indicating a \$1,000 valuation for the entire property (R. 1080, 1373). This sale took place in July, 1955, after the property had initially been rezoned for commercial purposes, but before the 1958 termination of a lawsuit challenging the zoning and before the property was rezoned to allow supermarkets (R. 1061). It also preceded the first favorable Smith report on Severance (Ex. 105, August 1958).

The sale of the remaining one quarter of the stock of the company on February 10, 1959, would indicate a site value of \$3,000,000. (R. 1152, 1373-74). At that time, the rezoning problems had been completely solved but Severance had no tenants who had signed leases. The earliest was still almost a year in the future (R. 1207). The final sale, to Smith, on February 1, 1960, after the execution of the department store leases before construction, was at \$4,000,000 plus a number of other intangible and valuable rights, for only 131 acres of the Severance property (R. 1225-26, 1374).

On a per acre basis, the 1955 sale was at just over \$10,000 per acre, the 1959 sale at just under \$20,000 per acre, and the 1960 sale at just over \$30,000 per acre.

Each of these sales is consistent with Smith's views on the value of regional shopping center sites (Ex. 368, p. 40).

What effect does a favorable report from a company like



Smith have on the value of a site proposed for a regional shopping center? Perhaps this question can best be answered by asking another. Would Severance have become a regional shopping center if it had been promoted by a real estate broker with no experience in the field and with a negative report on its potential from Smith on its hands in 1955? Even with Smith's zealous promotional efforts and highly favorable reports, it required over four years of hard work to secure the department store leases but that work paid off handsomely. (R. 1063, 1207). Without those reports and that effort, there is an excellent chance that Severance today would be vacant, or composed of single family residences or apartment houses.

Moreover, Smith did not hold itself out to Hilltop Realty as simply a shopping center analyst. Its original proposal of September 30, 1959 stated:

"Depending on the outcome of our analysis, we would be in a position to provide further analysis in connection with specific consideration to the financial aspects of the development potentials, including budgeting the financial requirements, and to the time requirements, and working with you and your principals in connection with the development program as a whole. This latter work could then be used as a basis for planning from the standpoint of legal mechanics and tax programming, as well as land use planning. \* \* \*

"We have also had experience in working on ground use plans, merchandising the plans of the property to be sold, working on financing of the investment properties, and consideration of assessed valuations and tax loads."  
(Ex. 32, pp. 2-3).

It was Smith's breach of contract and fraud in taking the

Hilltop job and in providing an erroneous analysis, Exhibit which deprived Hilltop of the opportunity to continue with a program with the same reasonable probability of success as Nutwood that had existed at Severance a year or so earlier. That opportunity itself, even though success was not certain, placed Nutwood at a stage attended by a far greater value which was reflected by the sale to Ridge Hills Development Company.

It is also clear that Ridge Hills did not include any conditions based upon changes in zoning or the construction of a full interchange at Bishop Road in connection with its offer of purchase of April 29, 1960 (R. 1238; Tr. 1664). Both conditions were, of course, necessary if the property was to be developed for commercial purposes, but neither was necessary if the property was to be used for residential purposes (Exs. 201, 202). It would be hard to imagine more conclusive evidence that Ridge Hills did not purchase Nutwood for shopping center purposes.

The opportunity to continue to promote Nutwood with a favorable analysis from a national shopping center consultant would have resulted in a value for the Nutwood property in the range between that of the first and second Severance sales and the range found by Hilltop's expert, Mr. Fenton. The foreclosure of that opportunity by Smith directly enhanced the value of Severance itself by making it more certain that it would come into existence as a regional shopping center and by making it more profitable after completion.

The key question raised by Hilltop's cross appeal is the highest and best use of Nutwood Farms on the date of the submission of Smith's analysis, and not the value of the land if its highest and best use was for shopping center purposes because, as this section demonstrates, there is no substantial disagreement on that point.

We have already shown that Mr. Fenton's appraisal is in substantial agreement with the view of Smith personnel on the value of shopping center land. There is no testimony controverting either Larry Smith or Mr. Fenton on that question because Smith's expert, Edwin Smith, appraised the Nutwood Farms only for residential purposes, because of a misconception of Ohio law. At page 8 of his appraisal, Exhibit 340, Edwin Smith states:

"Highest and best use of a given site as of a given date of valuation is limited by law and appraisal practice in the State of Ohio, to such development as is prescribed by existing zoning.

"Under such circumstances, the highest and best use for the subject site [Nutwood] is for residential usage, in conformity with the actual zoning regulations pertaining on January 8th, 1960.

"The appraiser has been asked by counsel to determine fair market value (a) based on zoning as of January 8th, 1960, and (b) on the assumption that future possible changes in zoning might be taken into account. Upon the latter assumption, the highest and best use in the opinion of your appraiser would still be the existing residential zoning, inasmuch as possible changes in the zoning of the subject property would be speculative."

The trial court found this premise, and thus Edwin Smith's conclusions, to be legally erroneous (R. 1470). The court apparent



relied on In re Appropriation of Easement for Highway Purpose Over Property of Darrah, 113 Ohio App. 315, 194 N.E.2d 582 (1963), the most recent and authoritative Ohio precedent on subject.

Edwin Smith assumed that the highest and best use of on January 3, 1960 was for residential purposes; Harry Fenn found that its highest and best use was for a regional shopping center. His findings were confirmed by Hilltop's shopping center experts, by Smith's expert, Mr. Roebuck, for all practical purposes, and would have been found by Smith himself in his analysis of Nutwood had that analysis been accomplished consistently with Smith's own usual methodology.

It is therefore submitted the fair value of Nutwood on January 3, 1960, was \$2,500,000; or \$17,500 for the shopping center land and \$5,000 per acre for the balance (Ex. 334A).

### CONCLUSION

It is respectfully submitted

1. The antitrust counts should be remanded for jury trial on the merits, and Hilltop should be allowed reasonable attorney fees on its Cross-Appeal.

2. The fraud and breach of contract counts should be remanded for reconsideration on the present record, and to receive further evidence if either party elects, or the Court directs, as to compensatory damages arising from sale by Hilltop.

value as a valuable regional shopping center site, because of  
their reliance on Smith's fraudulent report and fraudulent con-  
cealment of its impending purchase of a competitive site at  
everance.

3. Costs and disbursements should be allowed to Hilltop  
in its Cross Appeal.

DATED at Seattle, Washington, December 9, 1966.



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of

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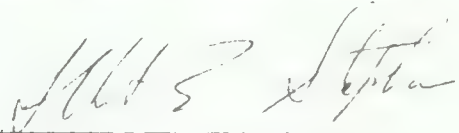




## CERTIFICATE OF COUNSEL

I CERTIFY that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By

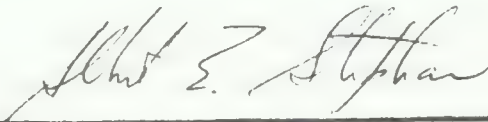


Albert E. Stephan of  
Attorneys for Cross-Appellants,  
HILLTOP REALTY, INC., et al.

## PROOF OF SERVICE

I CERTIFY that, pursuant to Rule 18(2)(d), on December 9, 1966, I caused three copies each of the foregoing document to be served on Helsell, Paul, Fetterman, Todd & Hokanson, attention Richard S. White, Esq., and Gerald G. Day, Esq., 1610 Washington Building, Seattle, Washington 98101, counsel for Larry P. Smith, et al., and on Bogle, Gates, Dobrin, Wakefield & Long, attention of Robert W. Graham, Esq., and Ronald E. McKinstry, Esq., 4th Floor, Norton Building, Seattle, Washington 98104, counsel for The Austin Company, by having my secretary mail the same to them at said addresses in duly addressed envelopes with First Class postage prepaid, and that said addresses are their last known addresses, and that said attorneys are all of counsel of record for Cross-Appellees.

By



Albert E. Stephan



## APPENDIX





MEMORANDUM DECISION OF MAY 13, 1963. [R. 21-2]  
Upholding Antitrust Counts

R.21] Defendants' principal attack against the complaint filed by plaintiff is found in their motion to dismiss the claims made in paragraphs XIV and XV of the complaint which invoke the Sherman Antitrust Act, 15 U.S.C.A. Sections 1 and 2.

Assuming the truth of the matters alleged in the complaint, which I must do at this stage of the proceeding, I am of the opinion that plaintiff states a cause of action under the most recent decisions of the Supreme Court of the United States. I am frank to say, however, that I am both shocked and surprised at the expanded concept of the Sherman Act as found in those decisions. If this were a matter of first impression, I think I might very well hold for defendants but I am not permitted much freedom of action. I may not agree with such decisions--but follow them I must. Accordingly, defendants' motion to dismiss the Sherman Act claims will be denied at this time. Defendants' motion to dismiss plaintiff's claim under the Ohio Antitrust Act will also be denied. The denial of the foregoing motions is made without prejudice to their being again raised by defendants after the entry of a pretrial order.

Further, defendants' motions to dismiss certain of [R.22] the parties, their motion for a separate trial on the issue of Federal jurisdiction and their motion for an increased non-

Finally, the parties should be advised that the Court invoked Rules 20A and 20B of the local civil rules of this and directs that pretrial procedures in this case shall be all respects governed by the provisions thereof.

The parties should commence discovery as soon as possible and have all such discovery completed as soon as possible. matter is placed on the Assignment Calendar for July 8, 1963, at which time the Court will set a date for the holding of a pretrial conference.

Plaintiff shall prepare an order in accordance with the Court's decision for presentation to the Court on Monday, May 20, 1963, at 9:30 a.m.

DATED this 13th day of May, 1963.

(s) W. T. BEEKS  
United States District Judge [R]

Excerpt from AMENDED MEMORANDUM DECISION OF MARCH 29, 1965  
Granting Partial Summary Judgment and  
Dismissal of Antitrust Counts at [R. 829-30]

\* \*

### THE ANTITRUST COUNTS

[829] In view of the complexity of the issues in this case and in order to permit the court to pass intelligently upon the pending motions, the court on December 14, 1964, ordered the plaintiff to file a detailed concise statement of its factual contentions. This the plaintiff has done and the court's rulings herein are based on those contentions rather than on the allegations of the amended complaint. Accepting as true these contentions and all reasonable inferences to be drawn therefrom, it appears that plaintiff's basic complaint is the submission to Smith of a false market analysis report which caused Alltop and the Winslow sisters to sell the Nutwood property at a price substantially below that which they could have obtained if they had sold it for shopping center development. Smith's alleged objective was the suppression of potential competition to its Severance shopping center. Austin is alleged to have conspired with Smith in the general objective of restraining shopping center competition, but no contention is made that Austin conspired in any way specifically with respect to Nutwood.

The court is of the opinion that these facts do not state a cause of action under the antitrust laws. Assuming, arguendo, that there was in fact an antitrust violation by the defendants,

including Austin, plaintiff shows no causal connection between the restraint of shopping center competition and its claimed injury. By plaintiff's own allegations its injury was caused by the fraudulent breach of a fiduciary duty. The fraud did not constitute the antitrust violation. To recover, plaintiff must establish two things: (1) A violation of the Antitrust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendants which constitute a violation of the Act. Glenn Coal Co. [R. 830] v. Dickinson Fuel Co., 788 F.2d 885, 887 (4th Cir. 1934).

In Schatte v. I.A.T.S.E., 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 827, a carpenter's union sued a company, a union and a number of major motion picture production studios alleging a conspiracy of the defendants to replace the carpenters with members of the defendant union. Four causes of action were alleged: Breach of contract by the studios; tortious interference with contractual relations by the competing union; deprivation of civil rights; and violation of the antitrust laws in that the major studios compelled smaller studios to hire inefficient members of the competing union to replace carpenters with the intention of thereby increasing the smaller studios' costs of production beyond their financial capacity, thus eliminating them from competition. One of the grounds on which the court based its decision was that "no damage to business property which stems from a conspiracy in violation of a



laws is alleged. The loss of their rights of employment is not  
result of any lessening of commercial competition among the  
studios." 182 F.2d at 167 (Emphasis added.)

In Peterson v. Borden Co., 50 F.2d 644 (7th Cir. 1931),  
Borden and certain majority stockholders of a competing milk  
company conspired to fraudulently induce plaintiff minority  
stockholders to sell to the majority stockholders at \$535 per  
share when the actual value was \$1,000 per share, for the pur-  
pose of enabling the majority stockholders to sell the corpora-  
tion to Borden, thereby lessening competition in the interstate  
milk industry. The court affirmed a dismissal, holding that--  
R. 831]

"... the right of action given to persons injured  
through the resultant tendency to substantial lessening  
of competition or creation of monopoly would in-  
clude such injury only as such tendency to lessen  
competition or to create monopoly engendered. We do  
not understand how a stockholder of an absorbed corp-  
oration who parted with his stock for less than its  
actual value can attribute his loss to the substantial  
lessening of competition or the creation of monopoly  
through acquirement of the corporate stock by a compet-  
itor. The competition destroyed or the monopoly  
created could not injure him in his relation as a  
stockholder of the acquired corporation, since he had  
parted with his stock." 50 F.2d at 646. (Emphases added.)

The case is in principle indistinguishable from the one at bar  
and the following excerpt therefrom will illustrate the lack of  
causal connection in Hilltop:

"(W)e are met at the outset with the utter want of  
causal relation between the alleged injury to plain-  
tiffs and the alleged statutory transgression by  
any of the defendants. The statute was not designed



to give to (persons) who have been defrauded in the sale of their (property) treble damages for their injuries, nor indeed any new or additional remedy for such injury. If they have been thus defrauded, the law aside from the antitrust statutes affords ample remedy." 50 F.2d at 645, 646.

Hilltop and the sisters have an ample remedy indeed, since Ohio law they may recover punitive damages which could conceivably total more than any double or treble antitrust recovery. The motions for partial summary judgment and for dismissal accordingly granted as to both antitrust counts, the parties agreeing in agreement that the law under the Ohio act is the same as federal law. In view of this disposition of the case the court finds it unnecessary to decide the issues raised relative to the statute of limitations, the effect in interstate commerce of the "target area" cases cited by the parties, or the complicity of The Austin Company in the alleged conspiracy. [R. 832]

\* \* \*

DATED this 29th day of March, 1965.

(s) W. T. BEEKS  
United States District Judge

UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

---

LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

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HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,  
Additional Cross-Appellee as to Count No. 4 Only.

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ON CROSS APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

---

ANSWERING BRIEF OF LARRY P. SMITH, et al.,  
AS CROSS-APPELLEES

---

**FILED**

FEB 13 1967

WM. B. LUCK, CLERK

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FEB 10 1967



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UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

LARRY P. SMITH, et al.,	Appellants,	)	
vs.		)	
HILLTOP REALTY, INC., et al.,	Appellees,	)	
_____		)	
HILLTOP REALTY, INC., et al.,	Cross-Appellants,	)	
vs.		)	No. 21207
LARRY P. SMITH, et al.,	Cross-Appellees,	)	
and		)	
THE AUSTIN COMPANY,	Additional Cross-Appellee	)	
	as to Count No. 4 Only.	)	
		)	

ON CROSS APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

ANSWERING BRIEF OF LARRY P. SMITH, ET AL.,  
AS CROSS-APPELLEES

I. HILLTOP'S FAILURE TO PROVE DAMAGE IN THE SALE  
OF NUTWOOD DEFEATS ITS ANTITRUST CLAIMS

Hilltop's cross appeal raises two issues. The first is whether the trial judge erred in dismissing on summary judgment Hilltop's claims of Sherman Act and Ohio state antitrust violation (Spec. of Error 1, Op. Br. 17)\*. The second is whether the trial judge erred in adopting factual findings after trial that

Hilltop's opening brief on its cross appeal is referred to herein as Op. Br. \_\_\_\_, Smith's opening brief on its appeal as Smith Op. Br. \_\_\_\_, the references to various parts of the appendix to Smith's opening brief are the same as explained at Smith Op. Br. 2. Hilltop's answering brief on Smith's appeal is Hilltop Ans. Br. \_\_\_\_.

to prove the conclusions of the Nutwood market analysis to be incorrect, had failed to prove that Nutwood had potentiality as a shopping center site and, hence, had failed to prove that Hilltop was damaged by the sale of Nutwood for \$3,500 an acre (Spec. of Errors 2-7, Op. Br. 17-18).

The damages alleged by Hilltop in support of its dismissed antitrust contentions all depend on the proposition that Nutwood was a potential regional shopping center and, as such, worth more than \$3,500 an acre. The state and federal antitrust claims of damage were alleged in identical terms:

"Defendants' wrongful acts were the proximate cause with the foreseeable result of plaintiff's damage in selling Nutwood at \$3,500 per acre when its true value was a minimum of \$20,000 per acre."  
(R. 680, 689).

Hilltop recognizes the awkward posture of its antitrust claim on this appeal. It tries to skirt the problem that the trial judge's findings as to damage defeat its position by emphasizing that the findings of no-damage were made by a trial judge, whereas it preserved its jury demand as to its monopoly claims, should they be sent back for trial (Op. Br. 21-22). The fallacy of Hilltop's position is clear. The trial court did not weigh the evidence. Rather it found no substantial proof of the fact of damage. If the antitrust claims had proceeded to jury trial, a verdict would have been directed in defendants' favor, for failure of Hilltop to present a substantial fact issue. The court found:

"The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge

Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture." (M.D., App. 10).

If a contention of damage "amounts to no more than speculation or conjecture", no jury issue is made out. Wolfe v. National Lead, 225 F. 2d 427, 433-34 (9th Cir. 1955), cert. den. 350 U.S. 915 (1955); see Keogh v. Chic. & N.W. Ry. Co., 260 U.S. 156 (1922). If a jury is permitted leeway in estimating the amount of damage when the fact of damage has been clearly established, if evidence on the fact of damage is purely speculative, no question of fact is presented. Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d 736-37 (9th Cir. 1959); Peters v. Lines, 275 F. 2d 919, 930-31 (9th Cir. 1960); McClonaghan v. Union Stock Yards of Omaha, 349 F. 2d 53, 56 (8th Cir. 1965).

Only if this court were to reverse the finding that Hilltop did not prove any damage in the sale of Nutwood would the court be required to examine the antitrust issues. Dismissal of the antitrust claims would necessarily follow from affirmance of the finding on the claim of damage, upon which the antitrust claims rest, if the finding amounts to no more than speculation or conjecture". Accordingly, we address ourselves first to the specifications which do not involve antitrust.

II. THE TRIAL COURT WAS CORRECT IN REFUSING TO FIND THAT THE "INTRODUCTION" DAMAGED HILLTOP (Spec. of Error 2, Op. Br. 17, 27-31)

Hilltop complains that the trial court's refusal to find that Hilltop's failure to include certain work material in the final draft of its report was a concealment which "resulted in damages to Hilltop" (Op. Br. 17). The material was a draft form of "Introduction", produced to Hilltop by Smith during discovery, among other workpapers



for the Nutwood analysis.

Contrary to the dark inferences Hilltop would have this court draw from the omission of the Introduction from the final version of the analysis, the trial judge found that "Smith fully performed its contract" (M.D., App. 17).

The principal witness who testified on the Introduction was John Marshall, Smith's economic analyst assigned to the Nutwood report. Marshall explained fully why the proposed Introduction was not included in the final memorandum (Tr. 1673-75). The less formal three-page personal letter from Treiger to Petti (Ex. 29, App. 150-52) was included in the final memorandum in lieu of the Introduction when it was decided that the preliminary findings were sufficiently negative as not to justify the further expenditure of Hilltop's money for a formal report. (See A.F., App. 59). As we read Hilltop's argument (Op. Br. 27-31) it would have this court find that Hilltop was damaged because the Introduction postulated Montgomery Ward as a possible prospective tenant for Nutwood, whereas the report did not mention any possibility by name. Yet Petti actually attempted, after delivery of the Smith memorandum, to interest Ward in Nutwood (A.F. No. 335, R. 1257). Ward wrote Petti a polite reply, simply thanking him "for calling this possibility to our attention" (Ex. 371, p. 266). Hilltop asks this court to reject Marshall's testimony and to assume, against the evidence, that Smith omitted mention of Ward for some vague ulterior reason. And, when Hilltop asks this court to find that failure to mention Ward in the Smith report "damaged Hilltop" (Op. Br. 27), it is asking this court to find that Ward would probably have



established a branch at Nutwood if asked in 1960, contrary to its lack of interest in 1961. The totally speculative character of the evidence of damage presented by Hilltop is exemplified by its claim that it was somehow damaged by Smith's inclusion of the internal letter from Treiger to Petti in place of the draft Introduction.

III. THE TRIAL COURT WAS CORRECT IN FINDING THAT HILLTOP FAILED TO SHOW THAT NUTWOOD HAD SHOPPING CENTER POTENTIAL  
(Spec. of Error 3, Op. Br. 17, 31-51)

A. The District Judge's Finding That The Nutwood Analysis Contained No Mistakes of Consequence Is A Purely Factual Determination Drawn From Live Testimony

Hilltop asks this court to set aside certain findings as "clearly erroneous" (Op. Br. 5, 19). F.R.C.P. 52(a) provides that in determining whether findings are "clearly erroneous", the regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". The trial judge, in presentation of judgment, observed that Hilltop's counsel was in the less happy position [than Smith's counsel] if he wants to deal in that his appeal would involve questions of fact." (R.2165)

The trial court held Hilltop's attack upon the Smith report to be unfounded (M.D., App. 10, also see O.O., App. 5-6). As we shall demonstrate, the record shows overwhelmingly that the analysis was correct. In fact Hilltop's principal expert witness on shopping centers stated that, with one minor exception, he found no factual errors in Exhibit 29 (Tr. 1229) and that the Smith methodology was proper (Tr. 1144). The same witness stated that his sole criticisms of the Smith memorandum were the estimates of per capita department store spending, which Hilltop does not now question, and estimates

department store effective competition (H. 1225-30). Hilltop's attack upon the report (Hilltop Op. Br. 31-51) thus sifts down to criticism of Smith's estimates of effective competition. This criticism, in turn, amounts to a play on the words "capacity" and "potential" (See Hilltop Op. Br. 33-38). Before we discuss those terms, however, we must refer to what Hilltop calls "major errors" but which the court found to be "inconsequential" (M.D., App.17). They consist of an apparent incorrect assumption by Smith's field man, Darmstadter, that the Sears store at Shoregate utilized its basement for storage space. This resulted in an overestimation of the store size by 30,000 square feet. The true size of the Shoregate store was well known to Hilltop as early as August, 1958, a year before it hired Smith (A.F. 159, R. 1141, see Petti Tr. 337-38). When Hilltop received the Smith report, Crume, secretary of Hilltop, immediately brought the discrepancy to Petti's attention (Tr. 347). If Shoregate had been measured at 40,000 square feet instead of 70,000, the result would have been to reduce the effective competition to Nutwood from 1,954,500 feet to 1,924,500 feet (Ex. 29, App. 160).

The only other error in Exhibit 29 asserted by Hilltop was a mistake as to the population of Census Tract LC-4. This discrepancy did not have any significant quantitative effect on the conclusions of the Nutwood report (R. 2288). Hilltop does not contend differently. Rather it takes the position that "the falsity of the conclusions of the Nutwood analysis is based almost exclusively on Smith's misuse of its own concept of 'total sales capacity' and 'effective competition' in the report" (Op. Br. 33-34).

In support of its position Hilltop states, "This Court may come to that conclusion from the Analysis and its workpapers and positions alone; it does not involve a challenge to ... credibility ..." (Op. Br. 35).

All of the witnesses who testified as to the meaning of "effective competition" and other similar terms appeared in court. They were Marshall, who wrote the Nutwood analysis (Tr. 1667-1712); Tiger, who was in charge of it (Tr. 2293-2324); Larry Smith\*, who developed the Smith methodology (Tr. 2326-2453); Steichen, who was in charge of the review memo, Exhibit 10, (Tr. 2042-2058); Hill, who was a principal witness for defendants on the Smith methodology (Tr. 2122-2293) and Hilltop's experts, Rienstra (Tr. 12-1305) and Ward (Tr. 1484-1535). While Hilltop did present position testimony by some of these witnesses in its case in chief and the direct testimony of experts was recorded in advance of the trial, the fact remains that each of these witnesses appeared at the trial and testified in person. The trial judge, therefore, had ample opportunity to observe their demeanor and to form his own judgment as to their persuasiveness and candor. The simple fact is that the trial judge did not accept Hilltop's contentions as to the meaning of the Smith concepts of "effective competition" and "total sales capacity". When the application of these concepts in the Smith methodology is understood, the false premise upon which Hilltop's claims rest becomes apparent. That false premise is that in determining the feasibility of a given site, it is improper to consider capacity for effective competition unless there is market potential equal to the capacity. Obviously, if a store capacity which is available to compete for a market



this judgment is expressed as a percentage which, when applied to the total sales capacity, provides a dollar figure. The total sales capacity figure does not vary because of the construction of new facilities. It remains constant. Larry Smith testified that discounting of the sales capacity of an existing facility because of the proposed construction of new facilities, as advocated by Hilltop (Op. Br. 40), was a "ridiculous" process of judgment (L. Smith Tr. 2363). Such a procedure would require a series of judgments which would have to be applied against varying assumptions, i.e., the capacity figure being reduced initially and then adjusted upward over the passage of time. The amount of the upward adjustment would depend on population growth and many other factors. This, Smith said, was not a correct application of the methodology he had developed (L. Smith Tr. 2362-63). It was never so applied by Smith in any of the 1,500 to 2,500 similar studies which had been prepared by Larry Smith & Company prior to January 8, 1960, nor in any studies made after 1960 (L. Smith Tr. 2336, Kelly Tr. 2183-84). The Smith methodology has been tested and confirmed by the research departments of major department stores and mortgage lenders all around the world (L. Smith Tr. 2363-64, 2). It is still in use (L. Smith Tr. 2348).

Smith's methodology may be described in brief. The first step is to define a trade area based on the assumption of a regional shopping center at the site under study (Ex. 344; Kelly Tr. 2130-40). Next, the population of the trade area is analyzed and projected for future years. Income levels are determined and per capita expenditure patterns are derived from published sources

Kelly Tr. 2140-61)). The product of population multiplied by per capita expenditures provides estimates of total retail sales potential or total spending likely to be done by trade area residents. This figure is then adjusted downward to account for spending in downtown stores. The remaining percentage figure is known as suburban share and the dollar amount known as suburban potential (Kelly Tr. 2130-31). After the suburban potential is determined, effective competition is subtracted from the suburban potential to ascertain unsatisfied potential. An estimate is then made of the share of the suburban potential for which the site could compete and conclusions are drawn as to the size, type and character of the facilities justified (Kelly Tr. 2131). Under Hilltop's theory -- that effective competition could never exceed suburban potential -- it would be impossible ever to reach a negative conclusion. Its error is simply that it confuses retail sales potential and retail sales capacity. Potential is the amount of dollar spending that will be available within a given area. Capacity, on the other hand, is a measure of the capability of existing retail facilities at normal levels to absorb what potential may exist (Ex. 29, App. 169). To say that capacity could never exceed potential is to argue that a market could never be overbuilt or that no more would ever be built in expectation of future market growth. The hypothetical example of a department store in the Mojave Desert referred to in the testimony illustrates the point (Tr. 1052). In that illustration, the capacity of the store exists, but the potential would be non-existent.

Hilltop charges that analysis of Exhibit 11, a "work book" by Severance, shows that "'total sales capacity' as that phrase is



1013-14, Marshall Tr. 1708-09, 1696). Contrary to Hilltop's suggestion (Op. Br. 40), it would be entirely illogical in the application of the Smith methodology to decrease "effective competition" on the theory that construction of the site under study would make it impossible for existing centers to compete as before. As Kelly said such a procedure would be "a bootstrap lifting operation by which the analyst assumes the answer before he begins" (Tr. 2185). The goal of the residual method is to determine how much unsatisfied potential exists for which the facility under study can compete, or, put another way, to test the ease with which a new facility might enter a market area (Kelly Tr. 2185, 2131). Once the unsatisfied potential is determined, then and only then is it appropriate under the residual method to estimate what part of that potential might be satisfied by the new center. This step in the process, undertaken only in a positive analysis, is known as determining the "center share" (See Ex. 29, App. 158, 161).

The residual method is not to be confused with the "share of the market" test, which Smith uses, and used in the Nutwood analysis as a cross-check against the residual approach. The impact of construction of the facility under study is considered in the "share of the market" test, which is based on an assumption that a given department store tenant will attract a given "share of the market" irrespective of other department store competition (L. Smith Tr. 2346-48, Kelly Tr. 2131-32, Ex. 29, App. 161-62). For example, the May Company in Cleveland, if it opened a branch in an area where it was not represented, "would be able to compete for a given share of the total suburban market of the trade area, more or less, regardless of the extent of other competitive facilities already

erving the area." (Ex. 29, App. 161).

Hilltop next refers to Marshall's lack of experience to make the study (Op. Br. 41). Yet his credentials were imposing. Before joining Smith, he had earned a master's degree in the economic field from the University of Iowa (Tr. 873), and had worked on the research staff of a St. Louis department store chain preparing economic reports for five years (Tr. 874). He felt that among similar studies he had conducted while with the Smith firm, Nutwood was relatively simple because there was only one site under study (Tr. 914-15). He was the Smith employee who made the economic judgments as to effective competition, uninfluenced by anyone else in or out of the Smith organization (Tr., App. 88-90), and without any knowledge that his employer had any possible proprietary interest in Severance (Tr., App. 92).

Hilltop attacks Marshall's professional judgment in estimating that Severance would be 50% effective within the Nutwood trade area (Op. Br. 41-43), i.e., that 50% of Severance's capacity would be attributable to residents of the Nutwood trade area. Hilltop's claims are not supported by the record. For example, Hilltop states that Marshall testified that the effective competition for Severance shown in Exhibit 176 related to the year 1962 (Op. Br. 42). Actually Marshall said that "the capacity of the store is not for a fixed date. It extends through time" (Tr. 1696). Hilltop urges that using population and income levels, in Hilltop's opinion the only two relevant factors, Marshall could not have come up with a figure for effective competition in excess of 30% (Op. Br. 42). However, Hilltop has ignored Marshall's testimony as to how he actually measured effective competition. He testified that

the factors he took in consideration were distance from the Nutwood site, size of competing facility and the strength of the competing facility. For facilities which represented substantial competition, trade areas were sketched to see how far those areas impinged on the Nutwood trade area. Marshall then made his estimates of the competition taking into account the size of the trade area, the extent of the overlap, the population and income levels, the strength of the competitive locations, whether the population was inboard or outboard\* and other matters (Marshall Tr. 1668-69, 1708-09).

Hilltop's position that only population and income should be considered in assessing effective competition conflicts with the testimony of Marshall, Kelly and other witnesses that population and income levels are only part of the equation and are to be weighed with other factors (Marshall Tr. 1668, Kelly Tr. 2175-76). Marshall's assessment of effective competition cannot be attacked by looking at only one piece of the equation.

There were no unusual problems and the methodology Marshall employed was the same used in other studies on which he had worked (Tr., App. 89-90). Marshall's estimates represented his professional judgment as to the proper percentages to be applied to total sales capacity (Tr., App. 90). His judgment was concurred in by both Imus and Treiger upon review (Marshall Tr. 1670-72).

The fallacy of Hilltop's reasoning is illustrated by its table entitled "Effective Competition within Nutwood Farms Trade Area" (Op. Br. 44). Hilltop points out on page 45 that despite the fact

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\*The terms "inboard" and "outboard" were defined in the Nutwood analysis (Ex. 29, App. 169) and were explained by Larry Smith



at all the suburban potential has been taken up by the effective competition of facilities other than Severance that Severance "was expected to take between 53% to 81% of the entire 'suburban share'". Hilltop then claims this is impossible. The term "suburban share" presents the percentage of an estimated volume potential (Ex. , App. 169). What Hilltop's table does show is that under Smith's residual test, even if Severance were ignored, there was insufficient potential to justify locating a department store at Nutwood Arms, since the effective competition excluding Severance (item 4) is substantially greater than the suburban share for Secondary B, equal to it for Secondary A and practically equal to it for the primary trade area. In simple terms, there was no discernible opportunity for a department store at Nutwood.

Hilltop's attack on Marshall's judgment as to the "'effective competition' attributed to Cedar Center ..." (Op. Br. 45-46) is based on misstatements of what Marshall did to arrive at his conclusions with respect to the May Company store at Cedar Center. Marshall testified he drew a trade area for the May Company based on the size of the facility and its strength (Tr. 1668-69). He did not know whether the trade area he used was exactly the same as the trade area for the May Company store shown in Exhibit 5, a Severance feasibility study made in 1955 (Tr. 1691). Marshall weighed many factors, including outboard-inboard density, arriving at a figure of 38%.

Hilltop's attack upon this conclusion is based on the unsupported assumption that the trade area shown for the May Company in Exhibit 105 is identical with the one Marshall had drawn. It assumes an estimate of overlap population of 15.9% made by its own

witness Ward. But, as Kelly testified, the map in Exhibit 105 shows an overlap in area of 45% to 50% of Cedar Center into the Nutwood trade area, which confirms the 38% estimate (Kelly Tr. 2190).

Hilltop also cites a license plate study undertaken in 1959 by Smith in the May Company parking lot (Op. Br. 45). This study is the one relied upon by Hilltop's witness, Dr. Rienstra, as the number one reason that his findings "differ radically with those of Smith" (Ex. 330, p. 6). Upon cross examination, he shamefacedly confessed that he had misplotted and misinterpreted the study (Tr. 1277, see Tr. 1264-69). Whereas Dr. Rienstra had believed when he prepared Exhibit 330 that only 3% of the May Company patronage came from the Nutwood trade area, correct interpretation of the data showed that 26% came from the Nutwood trade area (Tr. 1277). If one considers future population growth, increase in income levels, the inboard-outboard influence and the other criteria utilized by Marshall, the soundness of the 38% estimate is apparent. In fact, if one applies the premise used by the Ward firm of which Rienstra was senior partner (Tr. 1133) that the effective competition from Cedar Center would increase  $3\frac{1}{3}\%$  a year, one arrives at the same figure of 38% (Ex. 330, p. 19). As the court pointed out, the result follows naturally from this premise (Tr. 1289), for if one starts with the 26% impact in 1959 and projects it on a straight line basis to 1974, the mid-point of the Nutwood center's projected life, using the  $3\frac{1}{3}\%$  yearly increase estimated by Ward, one would come up with almost exactly 38%, the average effective competition estimated by Smith.



Hilltop's "final illustration", cited on pages 46-47 of its brief, is but another example of how Hilltop distorts the Smith concepts. Hilltop repeatedly labors the mistaken assumption that under Smith methodology the Shoregate Sears store would do a volume of \$2,800,000. Under the definition of total sales capacity, Shoregate would be capable of doing that volume under normal competitive conditions. Being capable of doing business means just that. It does not mean that \$2,800,000 is a fixed estimate of volume at any given time for Shoregate.

In comparing the \$2,800,000 "total sales capacity" of the 40,000 square foot Shoregate Sears store with the 1962 volume estimate of \$2,801,000 for a department store at Nutwood (Ex. 29, pp. 161), Hilltop has improperly mixed the residual and share of the market tests. The former figure is the total capacity of 40,000 square foot store; the latter is the share of the market which a department store could achieve in 1962 at Nutwood, assuming, irrespective of effective competition, it could attract 10% of the market. If a figure for capacity, comparable to the \$2,800,000 figure for 40,000 square foot Shoregate, were desired for a 50,000 square foot Sears store at Nutwood, it would be \$10,500,000 ( $150,000 \times \$70.00/\text{sq. ft.}$ ). But this would represent about 37% of the total Nutwood trade area department store potential of \$28,010,000 in 1962. Because of the location and strength of existing stores and their market position in Cleveland, Marshall felt that there was no store available to Nutwood which would achieve a 37% share of the market. The May Company was located in the area with a huge new facility at Cedar Center. Higbee and

Halle were announced for large branches at Severance. Together these three stores were first preference among downtown stores of 88% of Cleveland consumers (R. 1455). Hilltop had already tried to get Sears to locate at Nutwood. But Sears, with its new store at Shoregate, just north of Nutwood (Location 1 on map, Ex. 29, App. 159) was not interested (R. 1141, 1155, Petti Tr. 335-36). Hilltop also tried after the sale to Ridge Hills to interest Sears, with no effect (R. 1260, Petti Tr. 436).

Hilltop criticizes the "Review Memorandum" of Nutwood which Smith prepared after Hilltop had questioned the original study (Op. Br. 48-49). The purpose of the review was to test the validity of the Nutwood memorandum in the light of any new materials or data which had become available since the analysis was made, and to review the assumptions and judgments made in the original report (Steichen Tr. 1059). It was prepared in December, 1960 (Ex. 161) some eight months after Nutwood was sold to Ridge Hills, under the direction of a Smith senior associate who did not participate in the original study (Steichen Tr. 943). Hence, whatever the merits or demerits of the review memo, it could not conceivably have caused Hilltop or the sisters any damage. Moreover, when the asserted "errors" are viewed against the purpose of the study, they reveal the insubstantial nature of Hilltop's criticism. For example, Hilltop asserts that the trade areas shown in Exhibit 10 do not conform exactly with the statement that they represent 85% of the total customer samples (Op. Br. 48). The purpose of comparing the trade area for Nutwood used in Exhibit 29 with trade area for regional centers which had been built was to demonstrate with material available from Smith Company files that the Nutwood trad

area in Exhibit 29 was of a sufficient size to be a satisfactory area for testing the feasibility of developing a regional center at Nutwood (Steichen Tr. 1059-60). Steichen testified in detail by the several trade areas were selected, and how they contributed to the limited object of testing the size of the Nutwood trade area used by Smith (Steichen Tr. 1059-68). One illustration should suffice. Hilltop complains that in Exhibit 10 one-half of the "physical extent" of a comparable trade area was omitted (Op. Br. 49-49). The center in question was Southdale, near Minneapolis. Steichen used a trade area, for comparison with Nutwood, based on a license plate study undertaken at Southdale after it opened, rather than the trade area used to analyze the feasibility before it was constructed (Steichen 1065-67). Hilltop's criticism of the use of a trade area drawn from actual experience rather than one developed in pre-construction planning is unfounded.

Hilltop argues that the construction of two major centers, Great Lakes Mall and Richmond Mall, within the Nutwood trade area, proves the incorrectness of Smith's conclusions (Op. Br. 50-51). In advancing this contention, Hilltop neglects to inform this court that the developer of Great Lakes Mall, Edward J. DeBartolo (Tr. 361), turned down the Nutwood location in November, 1959 (Tr. 361), that the May Company, chief tenant at Great Lakes Mall, chose that site over Nutwood (Tr. 347-48, 425-26), and that the major tenants at Richmond Mall, Sears and Penney, also rejected Nutwood (see R. 1250). But more important, Hilltop forgets that the study which made was of Nutwood, not of the Eastern Cleveland suburbs (see Tr. 2176, Ex. 29, App. 150). Hilltop thus asks the court to assume, contrary to common sense, that the lack of potential



at one given location automatically means there is no potential at any other location within a trade area. Smith made no market studies of Great Lakes Mall, about eight straight line miles east from Nutwood (at Mentor, shown on map, Ex. 29, App. 159, also see Tr. 1283) and about twelve miles from Cedar Center (see Ex. 29, App. 159, point "4" northeast to Mentor). Obviously, the level of competition at the latter site would be greatly below that at Nutwood.

Hilltop's statement that Melvin Roebuck, an expert witness for Smith, "found considerable potential for Nutwood in 1970" (Op. Br. 50) provides a good example of Hilltop's misuse of the record. Roebuck in fact found from his independent study that the Nutwood location "could not support a regional center by 1970", and that the estimated space needed for a department store at Nutwood in 1970 was 29,000 to 44,000 square feet, whereas the minimum size of a department store for a regional shopping center is by definition 150,000 square feet (Tr. 1918, Ex. 29, App. 168).

The trial judge's findings that the conclusions of the Nutwood analysis were unassailably correct is borne out overwhelmingly by the record. Smith was only one of many skilled analysts to decide that Nutwood was not suitable for regional shopping center purposes. Unknown to Smith, when it undertook the analysis, all of the Cleveland developers and department stores had already reached the same conclusion.

IV. THE UNAVAILING EFFORTS FROM 1958 TO 1965  
BY HILLTOP, THE SISTERS AND RIDGE HILLS  
TO DEVELOP ANY INTEREST IN NUTWOOD AS A  
REGIONAL SHOPPING CENTER DEMONSTRATE THE  
CORRECTNESS OF EXHIBIT 29 (Spec. of  
Errors 3 and 4, Op. Br. 51-56)

Hilltop boasts that all experts found Nutwood to have excellent potential as a regional shopping center (Op. Br. 52). Yet the Nutwood site had been rejected before Smith was hired by every person in Cleveland knowledgeable of shopping centers. These experts were not evaluating Nutwood to prepare themselves to testify. They weighed Nutwood with a view of determining whether it offered them a reasonable business opportunity as a regional shopping center. These department stores and real estate developers constitute the court of last resort as to the potential of shopping centers. Their collective opinion with no dissent registered speaks more frequently than all of the expert testimony. In the appendix to our brief in support of our appeal we included a resume of the attempts from 1958 to 1962 to stimulate interest in Nutwood as a shopping center (p. 173-76). To prevail on any aspect of this appeal, Hilltop must upset the trial court's negative findings as to what Hilltop claims to be the "excellent potential" of Nutwood (Op. Br. 51). Hence, we shall review the record on this score in some detail.

In the Cleveland metropolitan area in 1958 when Hilltop commenced its representation of Nutwood there were only a few people who might develop a regional shopping center, which by definition contains a department store of more than 150,000 square feet (Ex. 29, App. 168). Among the department stores, the big three were The Higbee Company, which at that time had no branches,



Halle Bros. Co., and The May Company (R. 1455). William Taylor Company, a May Company affiliate, and Sterling-Lindner-Davis, an Allied Stores affiliate, were more remote possibilities. Finally Sears, which was then constructing a new store at Shoregate, was an additional prospect. Among the developers, Petti testified that two family groups dominated the scene, the Visconsis and the Ratners (Tr. 2505-07). In addition, there was Edward J. DeBartolo of Youngstown, reputed to be the largest shopping center developer in the Midwest (Petti Tr. 358).

Let us consider in turn each of these prospects in terms of their response to Hilltop's aggressive efforts to interest them in Nutwood.

A. Higbee

The Hilltop exclusive agreement was approved by the sisters on Tuesday, July 29, 1958 (A.F., App. 36). On the following Friday Petti and Crume met with Herbert Strawbridge, the responsible officer of Higbee, and presented him with various data concerning Nutwood. Strawbridge informed them that Higbee was "not committed anywhere", and agreed to inspect the site (R. 1139).

Crume and Petti met again with Strawbridge on Thursday, August 4, 1958, at which time Strawbridge told them Higbee would explore the possibilities of Nutwood (Ex. 371, p. 36, R. 1140). Petti testified that in his opinion Higbee's gave full and fair-minded consideration to Nutwood (Tr. 333-34). Strawbridge visited and inspected the Nutwood site with Petti and Crume on September 12, 1958. On that occasion he told them that Higbee was making its own study of the eastside market (Ex. 371, p. 47).

On January 28, 1959, Petti wrote to O'Neill that he had

presented Nutwood to an investment broker, who reported to Petti  
that he had discussed Nutwood with the President of Higbee, who  
said that "as far as The Higbee Company is concerned he would  
definitely not be interested." (Ex. 371, p. 72-74).

On Sunday, February 22, 1959, the Cleveland Plain Dealer  
announced that Higbee was going to build a branch at Severance  
(A.F., App. 37-38). The next day Crume wrote to Hilltop's site  
consultant that in view of the announcement that Higbee would  
build a branch at Severance, consideration would have to be given to  
the area for retail development at Nutwood (A.F., App. 38-39,  
p. 506-07).

Several conclusions may be drawn from the foregoing:

1. Hilltop had "a clear shot" to persuade Higbee to select  
Nutwood for a branch.
2. Higbee management was familiar with the Nutwood site be-  
fore reaching the decision to go to Severance. Hilltop had given  
Higbee aerial photos, maps, overlays, geological studies and other  
data on Nutwood on August 1, 1958 (R. 1139-40).
3. Hilltop knew in February, 1959, almost a year before the  
report, that Higbee had selected Severance. When it hired  
Higbee, Higbee's commitment was an accomplished fact, which Hilltop  
considered in its own planning (See Hilltop Ans. Br. 19, where  
this is admitted).

On August 3, 1959, Petti wrote O'Neill that he understood  
that Higbee "has already or is very close to signing a lease at  
Nutwood [Severance]" (A.F., App. 43).

After the sale to Ridge Hills Petti again attempted to interest Higbee in Nutwood. He furnished the company with an elaborate brochure, Exhibit 239 (Tr. 427). Petti had no response other than a polite letter from Strawbridge (Tr. 431, R. 1251).

B. Halle

Hilltop approached Halle Bros. Co. in December, 1958, to induce Halle to locate at Nutwood. Walter Halle, Jr., president of the company, wrote to Hilltop on December 31, 1958, declining any interest in Nutwood (R. 1148). Petti reported this turndown to O'Neill (Ex. 371, p. 74).

Ralph Walton, operating vice president of Halle, testified as to the long history of his company's interest in Severance which he said was "the strongest potential center of any in Metropolitan Cleveland." (Tr. 2066). Among its attributes were, "a 360-degree circle around it where you had dense population." (Tr. 2067).

Walton also testified that he received a continuous stream of requests to consider locations at the rate of two or three a week. He stated that he could not remember any feasibility report by Smith on Severance. He was interested in Severance before Smith was engaged by Austin (Tr. 2065, 2070). As to Halle's knowledge of its own customers and market, he said:

"... I am only saying in Halle's I feel I know about our customers, who they are, where they live, and particularly in Cleveland, because we have a tremendous number of accounts, up in the several hundred thousand of charge accounts, and I have absolute data on these charge accounts. I know exactly how much they bought by census tract and I have had studies of these made for many years, and so I don't think Larry Smith or anybody else could come



in and give me as much information about our customers and where they live and how much they buy and how much their income is as I could know myself." (Tr. 2070-71).

Quite evidently Halle's did not consider the Nutwood location to have sufficient merit to require any personal inspection or analysis.

In February, 1959, as already noted, the Cleveland papers carried the news that Halle, along with Higbee, would locate a branch at Severance (A.F., App. 37-38).

### C. May Company

In 1958, The May Company opened its branch at Cedar Center, the largest branch store in Metropolitan Cleveland (Ex. 209B, p. ; see Ex. 29, App. 160). On August 4, 1958, Strawbridge of the Higbee Company told Petti and Crume that the May Company "would probably not be interested [in Nutwood] because of its store at Cedar-Center." (R. 1140). This opinion was amply borne out by the later efforts of Hilltop to get May to locate at Nutwood. These efforts commenced prior to the Smith report with conversations by Petti with Sam Rosenberg, then president of the company, and Frank Coy, Rosenberg's assistant who later became president of the company. They visited Nutwood with Petti. Petti testified that he felt the May Company would give fair-minded consideration to locating at Nutwood (Tr. 347-48).

After the sale to Ridge Hills, Hilltop put on a concerted drive to interest the May Company in locating at Nutwood. It prepared an elaborate brochure, Exhibit 235, dated June 29, 1960, for presentation to the May Company. It followed up by getting Harry Ratner to arrange for a personal conference with Coy. Coy

came to the Hilltop office where Petti made his sales talk from a large aerial photo. Coy disagreed with Petti's estimates of the distance between Nutwood and the Cedar Center. Petti later called Coy to inquire as to the company's reaction to the brochure. Petti assumed from Coy's comments that May had made an economic analysis of the Nutwood trading area. Petti heard nothing further from the May Company as to these talks (Tr. 421-25).

On June 14, 1961, Petti wrote to David May in Los Angeles stating that he had been talking to Coy about Nutwood. Petti expressed his "firm belief that our location is a 'blue collar', and a middle income area as compared to your Cedar-Center location which caters to people in a much higher income bracket. I see little conflict as each of the trading areas is distinct in itself" (A.F., App. 87-88).

On July 11, 1961, David May thanked Petti for sending him a Nutwood brochure and said that, "if we have any interest we will correspond with you further" (Ex. 371, p. 272). Petti understood that the May Company was considering three alternative sites which he felt were probably Shoregate, Great Lakes Mall and Nutwood. Petti heard a rumor from Albert Ratner, who was trying to get the May Company to Shoregate that May had decided on Great Lakes Mall. Some years later, in late 1963 or early 1964, he read the announcement in the papers that the May Company was building at Great Lakes Mall (Tr. 425-26).

The foregoing review shows:

1. Petti staunchly maintained from 1958 or 1959 through June 1961, despite the Larry Smith report, that Nutwood did not conflict with Cedar Center.



2. Neither Rosenberg, Coy nor David May shared Petti's view. Obviously, the company which, like Halle's, must have felt that it knew its own customers and market better than any outsider, leapfrogged out to Great Lakes Mall, a location far less competitive with Cedar Center than Nutwood.

3. According to Fenton's report, Exhibit 334, the May Company paid almost \$32,000 an acre in 1955 or 1956 for its Cedar Center site (Addendum, Comparable Sale No. E). It must seem strange to the court that a company as successful as the May Company would pass up an opportunity to buy Nutwood for \$3,500 an acre if it were as good potential as a regional shopping center site! Of course, the answer is:

(a) Cedar Center was already a firmly established shopping district in a densely populated, high income area, and

(b) Cedar Center, as the Smith report indicated, is so directly competitive with Nutwood that the May Company would not consider Nutwood.

#### D. Sears

The ink was hardly dry on the July 29, 1958 agreement between Alltop and the sisters when Petti and Crume commenced pursuit of Sears as a potential purchaser of Nutwood. On August 4, 1958, they met with James Griffin, a Sears official. According to their memorandum of the meeting, one of Griffin's "prime interests" was the relation of Nutwood to Shoregate, then under construction (R.1141).

On March 7, 1959, Petti sent Griffin a written summary giving the Nutwood story and soliciting Sears evaluation of "the great potential of our Nutwood Development" (R. 1155-57).

On July 10, 1959, Petti met with representatives of a Cleveland investment group, which included Griffin, to discuss the possibility of "financing a development corporation through public sale of stock" (R. 1184).

Petti agreed that he pursued Sears "fairly aggressively" while acting for the sisters, until the property was sold to Ridge Hills and "would have no reason to believe that they would do anything but give fair-minded consideration". He believed that Griffin had sent one of his assistants to look at Nutwood (Tr. 336).

In September, 1961, during Hilltop's exclusive representation of Ridge Hills, Petti wrote again to Griffin, enclosing a Nutwood brochure and soliciting the Sears Company's interest in Nutwood for location of a store (R. 1260). (This was, of course, several years before Sears later decision to locate at Richmond Mall. See correspondence between Sears and Glazer-Marrotta attached to Comparable Sale No. C of Exhibit 334).

Referring to his contacts with Sears, Petti said:

"Q. Did you do that [contact Sears] then?

"A. I believe we did, yes.

"Q. With what effect?

"A. The same effect. I got no response from anybody." (Tr.

E. Sterling-Lindner-Davis

Sterling-Lindner, an affiliate of Allied Stores Corporation, had a downtown store in Cleveland at the time the Smith report was made. It had not established any branch anywhere up to the time of trial (Petti Tr. 352).

On July 15, 1959, Petti wrote to Sidney Galvin, representative of Allied, trying to interest him in Nutwood. Despite Petti's

tive pursuit (R. 1177, 1184-85), Sterling-Lindner made no proposal to locate a branch at Nutwood (Petti Tr. 353).

#### F. William Taylor Son & Company

On November 22, 1958, Petti sent David H. Scholl, vice president and general manager of William Taylor Son & Company, various data on Nutwood, including an aerial photo, site plan and isochron driving time chart (R. 1144-46). At that time Taylor was a subsidiary of the May Company. Later the May Company absorbed the Taylor Company, so that the former Taylor stores are now branches of the May Company. Again, Petti had no response from Scholl and Taylor never expressed any interest whatsoever in locating a branch at Nutwood (Petti Tr. 351-53).

#### G. Other Department Stores

After going to work for Ridge Hills, Petti sent Nutwood brochures to various other department stores, junior department stores, variety chains and discounters with no significant response. These included Montgomery Ward & Co. (R. 1257), Interstate Department Stores (R. 1257), J. J. Newberry Co., Allied Stores, W. T. Grant, W. Woolworth Co., J. C. Penney Co. (R. 1250), Shopper's Fair Stores, E. J. Korvette, R. H. Macy & Company, Inc. and several more (R. 1258).

About the most encouraging response was from Penney, which had only junior department stores in Cleveland at that time. Penney wrote to Petti that "at the present time the entire area is rather sparsely populated and it would be quite some time before the development you mentioned takes place" (R. 1250). Other than this, the responses which Petti got consisted of polite acknowledgments (e.g., Ex. 371, p. 240, 241, 266).



Petti testified that:

"Actually the situation in 1959 and 1960 in greater Cleveland area there were only two professional shopping center developers. They were namely the Ratners, not the one that I sold the property to, and the Visconcci [Visconsi] family" (Tr. 2505).

The record shows that in addition to the Visconsis and the Ratners, Edward J. DeBartolo was a good prospect to develop a shopping center in eastern Cleveland. According to Petti's testimony, DeBartolo was reputed to be the leading shopping center developer in the Mid-West (Tr. 358). The record shows that each of these three knowledgeable developers was actively pursued by Petti in his attempts to sell Nutwood.

i. Visconsi

Ralph Walton of Halle Bros. Co. referred to Tony Visconsi as "Mr. Shopping Center in Cleveland because of his age and the years he has spent in it ..." (Tr. 2065).

Within ten days after signing the agreement of July 29, 1958, Petti got in touch with the Visconsis:

"Mr. Henry Petti discussed Nutwood informally with Dominic Visconci ([Visconsi] as a means of stimulating interest in the property and to feel out the thinking of developers. Made tentative arrangements to fly over the area with him and to discuss the property in more detail" (R. 1141).

On January 28, 1959, Petti wrote to O'Neill of further efforts to negotiate with the Visconsis (Ex. 371, p. 73).

On September 14, 1959, Petti wrote to O'Neill of Visconsi's interest in a competing site:

"I understand that Visconsi and the Ratners ... are working together on a large tract at Shaker and Richmond Roads. You might recall that this

was the one in which Halle's had a strong interest a couple or three years back. We have heard from pretty reliable source that Halle's and Sterling-Lindner-Davis are showing interest in the site at this time" (Ex. 371, p. 110).

On September 29, 1959, O'Neill wrote in a file memorandum:

"Petti said also that Galvin told him that Halle's have indicated an interest in the Visconsi and Ratner proposed development at Richmond & Shaker, even if Halle's also goes into the Severance-Taylor-Mayfield site" (Ex. 371, p. 117).

Thus it appears that despite Petti's efforts extending back to August, 1958, the Visconsis never expressed any real interest in Nutwood. Surely, if Tony Visconsi, "Mr. Shopping Center" of Cleveland, felt that Nutwood had any merit he would have been receptive to Petti's pursuit.

ii. Ratner

Petti distinguished between two "factions of Ratners", both of which were large-scale land developers. One faction, headed by Harry, eventually bought Nutwood (Tr. 368-70, Tr. 2505-07). The other Ratner faction already owned or controlled many shopping centers in Eastern Cleveland, including Shoregate and Goldengate. They informed Petti that they were having trouble with their centers in the area (Tr. 369). They had tried unsuccessfully to lure the May Company (Tr. 426) and Halle (Tr. 2071) to Shoregate, two miles from Nutwood. In August, 1959, the Ratners, in declining interest in Nutwood, told Petti that "the shopping center market is saturated" (Ex. 371, p. 107). Speaking of the Visconsis and the Ratners, and particularly of his attempts to interest them in Nutwood, Petti said:

"These people felt that there were too many centers in that area and they were not interested" (Tr. 2506).



Hence it appears, according to Petti's own testimony, that the developers in the Cleveland area reached independent judgments that Nutwood was not a good site for a regional center. As Petti put it in an August, 1959 memo, the Ratners "insisted that it [Nutwood] cannot support retail or commercial development." According to Petti, they reached this conclusion on the same ground as the later Smith analysis, that the effective competition exceeded the foreseeable need.

Besides Visconsi and Ratner, there was one other possible developer-prospect for Nutwood, namely, Edward J. DeBartolo, who had no centers in Cleveland but was interested in invading the market.

### iii. DeBartolo

On September 29, 1959, O'Neill wrote in a memorandum of Petti's efforts to negotiate with DeBartolo of Youngstown (Ex. 371, p. 117). For the next two months, Petti pursued DeBartolo ceaselessly to try to arouse his interest in Nutwood. Petti and O'Neill, in fact, decided not to employ Smith, following Treiger's visit with them of October 8, until DeBartolo's site engineers made an independent study of Nutwood (R. 1193, A.F., App. 49).

Just how Hilltop can argue seriously that an affirmative report by Smith would provide some open sesame to development of Nutwood is a mystery. DeBartolo told Petti that he "would rather have his own site engineers report on the possibilities than any of the location experts with whom we had had communications" (A.F. App. 48-49).

In fact, DeBartolo's men told Petti unequivocally that they weren't interested in an outside feasibility study (Petti

360). Petti also said as to Harry Ratner that,

"... I don't think he'd have paid any more attention to the [Smith] report than the man in the moon" (Petti Tr. 380).

So, O'Neill and Petti decided to wait for DeBartolo's proposal based on the report of his own site engineers. Petti gave DeBartolo an oral option on Nutwood. DeBartolo's engineers told Petti that he had himself a deal (Petti Tr. 358-59). This deal involved a joint venture in which Nutwood was valued at \$3,500 an acre. Petti told Treiger that a national developer, who turned out to be DeBartolo, had been given until November 10, to make a firm proposal (A.F., App. 49). On October 16, 1959, O'Neill wrote the sisters that DeBartolo was making his own study and might make a proposal (Ex. 371, p. 130).

On October 19, O'Neill, Petti and Vincent Aveni of Hilltop journeyed to Youngstown to discuss Nutwood with DeBartolo's engineers and lawyers. DeBartolo's site engineer told them they would proceed with a full feasibility study and would outline "the kind of development that would be warranted at least initially" (Ex. 371, p. 132-133). O'Neill wrote the sisters on October 27 that DeBartolo would submit "a preliminary proposal ... within a few weeks..." (Ex. 371, p. 136).

On November 13, O'Neill wrote a memorandum that Petti had received no proposal from the DeBartolo people" (Ex. 371, p. 139).

On December 3, O'Neill wrote the sisters that Petti had reported to him that "... DeBartolo has been fussing around about other development in Mentor" (Ex. 371, p. 140).

On December 4, Petti wrote O'Neill, "Both the Ratner group and Edward J. DeBartolo are still 'talking' interest in Nutwood"

DeBartolo never made an offer for Nutwood (Petti Tr. 361).

In fact, DeBartolo never indicated to Petti that his people ever made a study of Nutwood (Petti Tr. 362). Rather, on December 14, 1959, DeBartolo bought the Great Lakes Mall site for \$2,627 an acre (Petti Tr. 361, Ex. 340, Appendix F. No. 11). Petti had understood at the time that DeBartolo was interested in putting together a shopping center at Mentor (Petti Tr. 361). Obviously, DeBartolo, who had an option to purchase Nutwood in October and November, 1959 weighed it against Great Lakes Mall and purchased Great Lakes Mall without even making any proposal on Nutwood.

On January 28, 1960, after he had received the Smith report and had received Harry Ratner's offer, Petti wrote again to DeBartolo recommending that he bid on Nutwood. In the same letter, Petti referred to the Smith report as "a very enlightening study" and offered to make it available to DeBartolo (A.F., App. 72). Petti never had any response from DeBartolo to his offer to make the Smith report available (Petti Tr. 361).

The only conclusion which can be drawn from the Hilltop-DeBartolo "negotiations" is that DeBartolo, who was "the developer owner of upward of thirty (30) shopping centers in northeast Ohio and Pennsylvania" (Ex. 371, p. 126, 127) had reached the same conclusion as The Higbee Company, The May Company, The Halle Brothers Company, Sears, the "Shopping Center" Ratners, the Visconsis, the twenty-five other real estate developers Hilltop pursued (Resume, App. 173-76) and, incidentally, Larry Smith and Company, that Nutwood was not a good site for development of a major retail center.

Unless the court reaches a conclusion different from that reached by the department stores, discounters and developers whom



1 Nutwood was a good retail site, Hilltop cannot prevail on any  
eory.

I. Nutwood Lacked Business Potential, The "Overriding"  
Ingredient of a Successful Shopping Center

Hilltop claims that irrespective of the judgments of Nutwood  
department stores, developers and the Smith firm, Nutwood had  
cellent potential under criteria laid down by Larry Smith in a  
ok co-authored by him (Op. Br. 52-54). Of the eleven criteria  
oted by Hilltop, ten relate to the physical characteristics of  
e site. However, the first criterion is:

- "1) The site must be located in the general area  
established as most desirable by the economic  
survey."

page 39, the authors say as to this first consideration:

- "1) Location of Site. We mention again that  
the correct location from the point of  
view of business potential is of overriding  
importance" (Ex. 368).

This is just common sense. A beautiful site in the Mojave  
sert might satisfy the remaining criteria. Nutwood, while not  
a desert, was deficient in business potential. It had too few  
ople, too much competition and no logical prospect for a major  
nant.

We do not mean to say by the foregoing that Nutwood was an  
eal physical location. In the eyes of a major department store  
e fact that about one-half of the area from which Nutwood would  
mally be expected to draw its patronage was deep in Lake Erie  
e plate one of Smith Op. Br.) might be a sufficient reason per  
to pass it by.

J. Freeway Access to Nutwood Was  
Purely Speculative In 1959-60

Another problem with Nutwood was that accessibility from the

freeway spur was dependent upon whether the Bureau of Roads would approve a four-way interchange near the property. This approval was still conjectural when the sisters sold to Ridge Hills. Smith analysis found that access to Nutwood would be excellent if the interchange were built (Ex. 29, App. 154), but counseled against development of the property until the highways were built (Ex. 29, App. 152).

After the Smith report was delivered to Hilltop a new federal order on spacing of interchanges appeared to doom the ramps at Nutwood. It was panic upon learning of this order which caused the sisters to sell when they did.

On January 20, 1960, Petti wrote to O'Neill relaying the misgivings of some of his prospects "as to if and when the spur become a reality" (A.F., App. 62-63). On February 17, 1960, two days before Mrs. Ashcraft wrote O'Neill from Gibraltar of her serious doubts as to the wisdom of selling to Ridge Hills (Ex. 371, p. 171-172), the Cleveland Press announced in a headline, "New U. S. Rule Seen as Dooming Freeways" (R. 1294). This meant no ramps for Nutwood, since the Bureau of Roads was requiring interchanges to be two miles apart and an interchange was certain for Euclid, a main artery just north of Nutwood (R. 1231; for location of Euclid see Ex. 29, App. 153). O'Neill frantically cabled and wrote Mrs. Ashcraft that the Ratner offer should be accepted immediately, before the Ratners realized the implication of the new order (R. 1231-32). On March 1, when details of the new order were made public (R. 1295), Petti called O'Neill in full panic stating that the "whole diamond at Bishop Road [Nutwood] might be ruled out under the new policy" (R. 1233-34). The day before, in response to



Neill's urgent cable and letter, Mrs. Ashcraft had cabled her authorization to accept Ratner's offer (Ex. 371, p. 178). Three months later O'Neill was still gloating to the sisters that he had put one over on Ratner in getting him to pay \$613,000 [\$3,500 acre] with the ramp only a possibility (R. 1243).

K. Rezoning of Nutwood Was Purely Speculative in 1959-60

Still another problem which inhered in Nutwood was zoning. In 1960 Nutwood was zoned residential (Op. Br. 54-55). Hilltop would now have the court believe that modification of zoning was a foregone conclusion (Op. Br. 54-55). Hilltop forgets that in its January 20, 1960 letter to O'Neill it stated that associates with whom it had talked expressed doubts about the rezoning which Hilltop characterized as "basic and real" (A.F., App. 62-63). It forgets also its previous experience in enduring a long and tedious ordeal to obtain rezoning for a shopping center, only to have the plan defeated by referendum (Tr. 278). Petti admitted that the value for shopping center purposes is created by rezoning (Tr. 278).

Hilltop also overlooks the litigation experience which defeated a regional center at Beachwood, near Severance. See Berger v. Sweringen Co., 95 O.L.A. 325, 200 N.E. 2d 489 (1964); (see Wal- (Tr. 2069) and the zoning litigation which kept Severance in the courts for several years (R. 1061).

On the possibility of rezoning Nutwood, Hilltop refers to the testimony of Martha Tyler (Op. Br. 55). Our motion to strike Mrs. Tyler's testimony was not passed on by the trial court, because it was found in Smith's favor on Nutwood's claimed potential as a shopping center (M.D., App. 10). Our motion was well taken. First,

Mrs. Tyler's testimony (Tr. 302-19) was proscribed under the rule that a public officer may not impeach and explain the record of official acts. 32A C.J.S. 152, Evidence §810b, Lillions v. Gibbs, 47 Wn. 2d 629, 632, 289 P. 2d 203 (1955), Seattle v. Parker, 13 Wash. 450, 43 Pac. 369 (1896). The minutes, resolutions or other official records are the only proper evidence of these proceedings. Moreover, Mrs. Tyler's testimony as to whether the Willoughby Hills Council was favorably disposed toward granting commercial zoning for part of Nutwood (Tr. 307) was inadmissible as hearsay and as an attempt to speculate as to the future course of official action. State Roads Comm. v. Warriner, 211 Md. 480, 128 A. 2d 248 254 (1957).

Except for the testimony of Mrs. Tyler, Hilltop presented no evidence as to the probability of rezoning. Its reference (Op. Br. 55) to the testimony of its valuation witness Fenton, as showing reasonable likelihood of rezoning, is without any supporting record reference. None could be made. Hilltop's reference to Exhibits 201-9 and 201-4 (Op. Br. 55) support no conclusion stronger than that the Willoughby Hills Council at an "informal meeting" on July 7, 1959 looked with favor upon commercial development of a portion of Nutwood.

L. The Independent Survey of Nutwood By Roebuck  
Confirmed Smith's Negative Conclusions

Hilltop boasts that Melvin Roebuck, a Smith expert witness, "was an expert witness for Hilltop" (Op. Br. 55). Since the court found against Hilltop on the issue to which Roebuck's testimony was directed, if Roebuck's testimony supported Hilltop's position, the judge was evidently not persuaded by it. Hilltop's strained

effort to convert Roebuck's findings into an endorsement of Nutwood is thus of little moment. The trial judge found, from the alter of facts and expert opinions presented as to Nutwood's potential as a shopping center, that Hilltop had failed to prove its contentions (M.D., App. 10, O.O., App. 5, 9)

The invalidity of Hilltop's claim that Roebuck's testimony somehow supported its position lies mainly in its neglect to distinguish Roebuck's finding of potential of total retail area at Nutwood by 1970 of 286,000 square feet and his finding that of his total, "at best I could find around 44,000 square feet for a department store" (Tr. 1917-19). To put this testimony in perspective, it is necessary to understand its background.

In his study of Nutwood Roebuck applied techniques developed by the Cleveland-Cuyahoga County Regional Planning Commission. When he testified, Roebuck was Director of Research and Planning for the Greater Cleveland Growth Board (Tr. 1897). He was previously chief planner for the Cleveland-Cuyahoga County Regional Planning Commission and had served as a consultant to various governmental agencies (Tr. 1900-02). While with the Planning Commission he was responsible for the program, methods, collection of data and writing of Suburban Business Centers (Ex. 209b) and its Technical Supplement (Ex. 209c). These two reports, which were prepared in 1956-58 (Tr. 1911) but released to the public in July, 1960 and late 1961, respectively (Tr. 1903) were supported by \$80,000 to \$90,000 of county and federal funds. They were intended to develop the existing pattern of shopping center activity in suburban Cleveland and to forecast future space needs in retail categories (Tr. 1904).



From some 35,000 consumer interviews, Roebuck and his staff determined that in suburban Cleveland each family supported 45 square feet of retail space, consisting of 30 square feet in suburban business centers and 15 square feet in other retail facilities (Tr. 1906).

Roebuck was asked by counsel for Smith to make an independent study of Nutwood to determine whether in his opinion, based on data available in January, 1960, the site would support a regional shopping center by 1970 (Tr. 1912). He had never read or seen Exhibit 29 (Tr. 1916-17). Using the materials and methods developed in the earlier studies, Roebuck defined a trade area for Nutwood and determined the "net supporting families" available to the site from that trade area (Tr. 1914-16). These areas and the net supporting families are shown on Exhibit 341 by census tract.

Roebuck found that his net supporting families would support only 286,110 square feet of total retail area at Nutwood, which would include convenience goods stores, personal services and shopping goods store types (Tr. 1916). Plainly, a total of 286,110 square feet at Nutwood by 1970 could not fulfill Roebuck's initial assumption that a regional center at Nutwood would "be one that is a minimum of a half million square feet ..." (Tr. 1913). Since his assumption of a department store at Nutwood was for one with a minimum size of 150,000 square feet, and he could find only 44,000 square feet of department store potential, his ultimate conclusion was that the Nutwood trading area could not support a regional shopping center by 1970 (Tr. 1918).

Hilltop's statement that Roebuck's 1970 retail potential of 286,110 feet was after discounting facilities constructed between

50 and 1965 is in error (Op. Br. 55-56). For the statistical data used in preparation of Exhibit 341, Roebuck "flashed back to history and did it as of 1959" (Tr. 1913). He did, however, accidentally review shopping center and population developments since 1961 (Tr. 1914). Contrary to Hilltop's claim, Roebuck's study of Nutwood was not "radically more favorable than Smith's analysis" (Op. Br. 57). Smith also found general retail potential for Nutwood in 1970. But, as Roebuck confirmed, very little of this was department store potential. To illustrate from Exhibit 341, the Smith Nutwood workpapers, the fourth paper down on the left-hand side shows some \$14,801,000 of unsatisfied food potential for the Nutwood primary by 1970, \$1,835,000 worth of potential for "Furniture and Appliances", \$2,087,000 worth of "Drugs" potential, and only \$122,000 of "Department Store" potential (See Ex. 29, App. 10). In fact, Smith's conclusion to Hilltop was that "a neighborhood center (i.e. one featuring convenience goods, primarily) can be developed at the subject location" (Ex. 29, App. 152). What Nutwood lacked, as Smith and Roebuck found, was sufficient department store potential by 1970 to justify the development of a regional shopping center.

V. THE TRIAL JUDGE WAS CORRECT - HILLTOP FAILED TO PROVE THAT THE VALUE OF NUTWOOD EXCEEDED \$3,500 AN ACRE (Spec. of Errors 4, 5 and 6, Op. Br. 58-68)

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The trial court found that Hilltop failed to prove that but for the lack of a favorable market analysis it would have been able to find a buyer willing to pay more than \$3,500 an acre for Nutwood (M.D., App. 10). The court was not persuaded by the testimony of Hilltop's expert on valuation, Fenton, that the property



was worth more than Ridge Hills paid (M.D., App. 10). Hilltop attacks the court's observation that Fenton's testimony was founded on hindsight and on comparable sales which were not probative of Nutwood's value (Op. Br. 58). This court's review of the trial court's action on this phase of the case is to determine whether the findings were clearly erroneous. We called the trial court's attention to the many deficiencies in Fenton's testimony in a motion to strike Fenton's opinion as to value (Tr. 1476). The trial court, because of its conviction that Hilltop had not proved Nutwood to be worth more than \$3,500 an acre, found it unnecessary to rule on our motion (M.D., App. 10).

The four basic shortcomings of Fenton's testimony were:

1. His valuation was founded in major part on developments subsequent to the valuation date of January 8, 1960, in violation of the rule stated in Standard Oil Co. of Calif. v. Moore, 251 F. 2d 188, 221 (9th Cir. 1957), cert. den. 356 U.S. 975 (1958).

2. His valuation was founded in major part on facts not in evidence, again in violation of the rule stated in Moore at page 221.

3. His valuation was based upon the assumption of changes in use and zoning, contrary to Olson v. United States, 292 U.S. 246 (1934); United States v. Benning, 330 F. 2d 527 (9th Cir. 1964) and 4 Nichols, Eminent Domain, p. 245, Section 12.322[1]. These authorities require that valuation be based upon existing use and zoning. The possibility of change may be considered but may not be assumed.

4. His valuation was based upon speculation as to future policies of the Bureau of Roads, and was, therefore, improper

er such cases as Polson Logging Co. v. United States, 160 F. 712, 717 (9th Cir. 1947), and United States v. Cooper, 227 F. 857 (5th Cir. 1960).

We will review these improprieties in the order stated.

A. Fenton's Valuation Was Based  
In Major Part on Hindsight

Fenton's testimony of valuation depended upon his finding that the highest and best use for Nutwood was for regional shopping center purposes (Tr. 1408). He stated that all of the factors set out in his written appraisal, Exhibit 334, influenced in some measure his valuation (Tr. 1408). That this appraisal was founded principally on hindsight may be seen from the following review thereof:

Page 1.

(A) The "Location of the Property" speaks as of 1965, not January 8, 1960 (Tr. 1409).

(B) Fenton relied for his assumption that Nutwood was a "prime regional shopping center site" upon a report by Joseph B. Ward & Associates which was written in 1965 and which itself depended on driving time surveys made in 1965 on roads not in existence in 1960, and documents, such as Retail Watersheds, Exhibit 330, published after January, 1960.

Page 2.

The population figures relied upon by Fenton were from the 1960 census, which was not available on January 8, 1960 (Tr. 1415-16).

Page 3.

Access was described in the present tense over roads not

in existence on January 8, 1960. Further, access from the proposed Euclid Spur to the property was described in the present tense as by "a full diamond interchange" which was not the fact on January 8, 1960 (Tr. 1417-22).

Page 4.

"There are many subdivisions building up around the property to the south and east...." Fenton had no idea how many of these subdivisions were in being in January, 1960 (Tr. 1417-18).

Page 4.

"Utilities, in 1960 were to the property, although not to the extent that they are now." Fenton had no familiarity with the extent to which the property was served by utilities in January, 1960 (Tr. 1423-31).

Page 4a.

Fenton's plot plan of the property showed 1965 zoning. He indicated on page 5 under "Zoning" that the 1960 zoning was for "suburban residential uses". Yet he testified that he purposely did not investigate any properties as potential comparable transactions which were so zoned (Tr. 1468-69).

Page 5.

After reciting that "As of the day of inspection the south portion of the tract ... is zoned either for commercial or light industrial and research park uses," he concluded, "Thus, it is presumed that the zoning would have been no impediment to putting the land to its highest and best use. Obviously, Fenton was strongly influenced by the hindsight

Page 5.

Again, under "Highest and Best Use", Fenton spoke in the present tense, in terms of 1965 access, population, commuting tolerances, etc.

Page 6.

Fenton drew broad inferences from the construction of Severance and Great Lakes Mall, both of which were built after January 8, 1960. He also referred to Richmond Mall which had not even been considered by January 8, 1960.

Page 7.

Again, Fenton referred extensively to construction of Richmond Mall, Great Lakes Mall and Severance, all much later events.

Page 8.

In the first full paragraph Fenton referred to what the present owners of Great Lakes Mall felt their property was worth. Further, Fenton referred to the Smith-Austin agreement on Severance of February 10, 1960.

Page 9.

Again, Fenton referred to construction of Severance, Richmond Mall and Great Lakes Mall, all of which occurred after January 8, 1960, and made sweeping comparisons and conclusions.

Page 11.

In the second full paragraph Fenton spoke of Nutwood as "located at the junction of the two great freeways serving the East Cleveland area, on a traffic interchange, and that



the other three corners of the interchange do not have the unity of ownership nor the zoning, nor as good identification with the freeway as does Nutwood." All of this spoke as of 1965, not January 8, 1960.

Addenda to Exhibit 334.

Of Fenton's comparable sales, only "A" (Great Lakes Mall) and "E" (May Co.) are pre-January 8, 1960. Even as to Great Lakes Mall, Fenton applied a liberal dose of hindsight. He stated, "It is interesting that the owner now says the land is worth about \$50,000 an acre," and wrote that the "Zoning" was "Commercial". Although this would seem to relate to December 14, 1959, Fenton testified that it related to 1965 zoning (Tr. 1451). He did not even know whether the Great Lakes Mall property was rezoned to commercial before or after January 8, 1960 (Tr. 1451-52).

Comparable Sale No. B involved the purchase by Sears of a site in the Richmond Mall Shopping Center on December 20, 1963, almost four years after January 8, 1960. Not content with four years of hindsight, Fenton relied on later hearsay in stating, "... 350,000 square foot Sears unit being built a part of the Richmond Mall Shopping Center," referring to to July 1, 1965.

Comparable Sale No. C involved an assemblage of many tracts for the Richmond Mall Shopping Center. Of the twenty-one (21) transactions listed by Fenton, sixteen (16) were in 1964, two (2) were in 1963 and three (3) were in October, 1962. Fenton wrote as to "Zoning" - "Property has been rezoned from residential to business and commercial" but



was vague as to dates when this was accomplished as to individual parcels (Tr. 1453).

As to Comparable Sale No. F, Severance, Fenton stated, "This property is now developed into the finest shopping center in the Cleveland area." Despite the fact that Fenton on direct referred to Severance as his chief comparable (Tr. 1382-83), he had the mistaken idea that the Severance rezoning was not accomplished until 1960 (Tr. 1454-55). Actually, the property was rezoned for shopping center purposes in 1954, before the first transaction referred to by Fenton under Comparable Sale No. E (A.F., App. 30).

In his "Supplementing Appraisal", Exhibit 334A, dated July 19, 1965 (the trial started July 20, 1965), Fenton presented twelve pages of additional hindsight. For example, he compared the Nuttall assessed values of 1960 and 1965 and stated,

"It is interesting to note that the land in Willoughby Hills is recognized as having changed in character, in the fact that the assessed value has tripled since 1960. The land in Wickliffe has been considered as rather residential or institutional, that north of the spur being in close proximity to a college while that south of the spur behind the Sohio Gas Station being platted for residential purposes. This platting has been partially implemented with grading and water lines, but I am informed by Mr. William Bendfelt, City Engineer for the City of Wickliffe, that the City is being petitioned for a change in zoning to accommodate a major motel and restaurant operation to be built by Stouffer's." (Ex. 334A, p. 1).

The references to a Sohio Gas Station, platting, grading and other possible improvements of the property were all to events since 1960, or to rumors of future events (Ex. 334A, p. 1).

Page 2 of Exhibit 334A is a mixture of hindsight, corrections

and inadmissible hearsay. In the first category, Fenton amended his acreage by deducting 26.24 acres. This was the acreage actually taken for the Euclid Spur in December, 1960. Obviously, the acreage of taking could not have been known in January, 1960 (See Tr. 1434-35).

On pages 3-4 under the heading "Zoning", Fenton stated:

"Zoning - The information on zoning as given on Page 5 of the appraisal [Ex. 334] is garbled. Present zoning in the Willoughby portion of the tract being divided between business in the south portion and multiple family in the north portion. The Wickliffe portion south of the freeway remains zoned residential, but an application is being made for a revision to business, a change which Mayor Beebe says will be welcomed."

None of this zoning information would have been available to an appraiser in January, 1960.

On page 4, Fenton referred to "a strip development, such as appears to be developing" at Nutwood and to present zoning of the other three corners of Chardon and Bishop. Next, Fenton reported conversations with a variety of people who purportedly theorized with him as to what different course events at Richmond Mall, Severance and Great Lakes Mall might have taken "had Nutwood been underway". This unsworn hearsay, based on purely speculative hindsight, is what Fenton used to make his valuation.

Next Fenton analogized from Nutwood in Cleveland to Northgate Shopping Center in Seattle. This court recently frowned on this type of cross-country comparability in Fairfield Gardens, Inc. v. U.S., 306 F. 2d 167, 171 (1962).

The foregoing review supports the district court's finding that Fenton's testimony was based on hindsight (M.D., App. 10). Fenton's valuation opinion was most certainly based "in part upon

tain events, facts and business developments occurring subsequent to that [valuation] date." As held in Standard Oil Company Moore, 251 F. 2d 188, 221 (9th Cir. 1957), such a valuation is proper and inadmissible.

B. Fenton's Valuation Was Based  
Largely on Facts Not In Evidence

In reaching his opinion Fenton drew freely from facts not in evidence. Many of these facts were doubly objectionable as pertaining to events occurring since the critical date of January 8, 1960. An example is the Homer Hoyt report on the Richmond Mall site, referred to by Fenton on direct (Tr. 1356). This report was prepared in March, 1964 (Tr. 1476). Fenton referred to the "glowing feasibility report from Mr. Homer Hoyt" (Tr. 1384). While this comment was stricken on our motion (Tr. 1398-99) Fenton's valuation is obviously based in part on the report, which is not in evidence.

Fenton's use of improper evidence is typified by his "Supplementing Appraisal". This exhibit was neither offered nor even marked while the witness was on the stand. Thus, we were deprived of the opportunity of cross examination. In that exhibit Fenton falsely related purported conversations with the City Engineer of Wickliffe (page 1), the mayors of Willoughby Hills and Wickliffe (page 2 and bottom of page 3), Charles Knight (page 4), a Mr. Lanzinger (pages 4 and 10), a Mr. Marotta (page 4), and a Mr. Ostriana (pages 5-11).

Fenton's complete lack of understanding of the proper use of comparable transactions is demonstrated by his reference to and use of the taking by the State of Ohio of part of Nutwood for highway purposes (pages 7-8 of Exhibit 334A). This "comparable",



which the witness did not include in the transactions exchanged before trial, became the keystone of Fenton's "revised" appraisal of \$2,500,000. He used it directly in his appraisal of 39.48 acres of Nutwood on page 9 of his Exhibit 334A.

It is axiomatic that transactions involving prospective condemnors are inadmissible, unless very careful foundation is laid. See cases gathered at 85 A.L.R. 2d 163-173 (1962). Fenton did not state whether he had talked to either the State of Ohio or to Ridge Hills Development Co. (called "Ridgeway" by Fenton on page 8) to determine whether the amount of consideration paid was influenced by the fact that the grantee was a condemning authority. Also, Fenton ignores blithely the fact that the part taken by the State included all of the Euclid Avenue frontage which was already zoned to support 180 apartment units (A.F., App. 79, Ex. 348A, p. 3).

Another puzzling aspect of Fenton's "revised" appraisal is the fact that he stated "The appraisal should have been, and I don't know how these blind spots hit you, but the appraisal should have been of 132 ... acres ..." (Tr. 1432-33), whereas in his Exhibit 334A, page 9, he appraised the full 174 acres.

Still another inconsistent aspect of Fenton's testimony was his insistence that he made no investigation of residential transactions:

"Q. Now, I believe I asked you a question about whether you incident to this winnowing process which you testified to on direct examination had found any sales of residential real estate in the Greater Cleveland area, restricting ourselves to the Nutwood trading area, of more than thirty acres which have been sold at \$3,500.00 an acre before January 8, 1960, didn't I?

"A. That's right.

"A. No, I didn't, Mr. White, I didn't look for any residential sales of any kind.

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"Q. Did you find any such transactions?

"A. No, I don't know of any. I didn't look for any.

THE COURT: You mean when you were in Cleveland you didn't look for any?

"A. That's what I mean, your Honor, I didn't look in Cleveland for any residentially-zoned properties" (Tr. 1468-69).

Yet on page 8 of Exhibit 334A Fenton states, "It appears from the investigation made of this period of time, that the residential market was something above the \$3,500 paid by the Ridgeway Development Company, but not above the amount paid by the State."

How could Fenton state on July 19, 1965, that the "residential market was something above the \$3,500 paid by the Ridgeway Development Company ..." and state on July 29, 1965, under oath, that he found no residential transactions above \$3,500 an acre because he did not investigate transactions involving residential property? Either Fenton made no investigation of residential transactions, in which event his reference to the residential market is unsupported, or he made an investigation and testified falsely. In either event his opinion as to the value of Nutwood is based on facts not in evidence.

C. Fenton's Valuation Was Based on Improper Assumptions as to Potential Use and Rezoning

The impropriety of valuation testimony founded on assumption of rezoning and potential use of the property based on rezoning is nowhere better stated than in Nichols, Eminent Domain, p. 245-246, sec. 12.322[1]:



An important CAVEAT to remember in applying the rule is that the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning."

One of the cases most frequently cited in support of this proposition is United States v. Meadow Brook Club, 259 F. 2d 41 (2nd Cir. 1958). There the property to be valued was zoned residential, but the property owner had filed a petition for rezoning to industrial use before the valuation proceeding was commenced. At the trial the property owner sought to establish the value of the tract as industrial property. The trial judge considered:

"'[t]o what extent the possibility or probability of a change [in zoning] would affect the value as of the date of taking' and stated only the obvious when it said that such effect 'is dependent upon the degree of probability, the imminence of the change, the effectiveness of the opposition, and other factors which are largely speculative and conjectural.' D.C.E.D. N.Y. 149 F. Supp. 749, 752." (259 F. 2d 41 at 44, Footnote 2).

The Court of Appeals affirmed. Its holding was as follows:

"Just compensation compatible with the requirements of the Fifth Amendment is the fair market value of the condemned property just prior to the taking. [citing cases]. This evaluation should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable. Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 709, 78 L. Ed. 1236. It would be improper to value the property as if it were actually being used for the more valuable purpose." (259 F. 2d at 44-45) (Emphasis added)

The court rejected the property owner's contention that the property should have been valued "as if it had already been rezoned for industrial use ... because of the alleged imminence of such rezoning." (259 F. 2d 41, 45).

Benning, 330 F. 2d 527, 532 (9th Cir. 1964). This court said  
ere:

"... The Government correctly points out that a potential future use of condemned property should be considered not as the present measure of value but only to the extent that the prospect of demand for such use would have affected the price a willing buyer would have offered for the property just prior to the taking."

Now let us review Fenton's testimony in the light of these established rules. In short, did he weigh the possibility of zoning change and regional shopping center use as a factor in reaching his valuation or did he assume that the property was actually being used for the more valuable purpose or would be in the immediate future?

First, let us look at Fenton's appraisal, Exhibit No. 334.  
page 2, he says:

"Thus, it is assumed that the Nutwood Farms property on the date of appraisal was a regional shopping center site, with enough retail trade available to it to make it a success at that time, and that this was known to the trade through a highly responsible feasibility study, whose conclusions were favorable and which recommended immediate development.

"This assumption includes the fact that as of January 8, 1960, so far as was known, there was available for this site an adequate department store tenant, such as the May Company, Sears Roebuck, Federal Department Stores, Higbee and Halle, or others."

On page 5, under "Zoning", he says:

"Thus, it is presumed that the zoning would have been no impediment to putting the land to its highest and best use."

On Page 12, he says:

"On the basis of the above, it is my opinion, therefore, that the value of the Nutwood Farm site,

as of January, 1960, assuming it to be ready for shopping center use as evidenced by the Joseph B. Ward Feasibility Study, was between \$15,000 and \$20,000 per acre and in my judgment the value was about \$17,500 per acre, which for 173.439 acres is \$3,035,183, ..."

On direct, Fenton testified:

"Q. Would you continue with any other factors upon which your opinion as to the highest and best use of the property was based?

"A. Yes, as of the date of the appraisal, the property was zoned residential, but my investigation indicates that both the Town of Wickliffe, and the Village of Willoughby Hills would have been very cooperative in helping a developer put a regional shopping center on this property, and therefore I assume that the matter of proper zoning presented no problem " (Tr. 1364).

On cross, Fenton confirmed the fact that he assumed the rezoning of Nutwood rather than having weighed the possibility of rezoning (Tr. 1436). He also assumed that the property could be developed for regional shopping center purposes, rather than having weighed the possibility (Tr. 1436). If there were any doubt as to Fenton's assumption as to rezoning, it is resolved by his steadfast insistence that he considered as comparable to Nutwood only tracts which were already zoned commercial (Tr. 1469).

D. Fenton's Valuation Was Based on Improper Assumptions as to Future Policies of the Bureau of Roads

The rule that a witness may not base his valuation testimony on assumptions and speculation as to future policies of the Federal Government is well illustrated by Polson Logging Co. v. United States, 160 F. 2d 712, 716-717 (9th Cir. 1947); also see United States v. Cooper, 277 F. 2d 857, 860-862 (5th Cir. 1960). In Polson the Secretary of Agriculture sought to acquire lands for a road intended to service a national forest. The land comprised



one-hundred-foot strip some eleven miles in length. At trial the government witnesses testified that the highest and best use of the property was for a fire trail, whereas the property owner's witnesses claimed the highest and best use was for a logging road for removal of timber from the Olympic National Forest. The trial court's rejection of the property owner's testimony as to value was upheld:

"... What policy the government or the Forest Service might pursue in the future was too speculative to affect the market value of the property while in private ownership." 160 F. 2d 712 at 717.

Fenton's opinion as to value was based in important part on the assumption that the Euclid Spur would be built and that the Bureau of Roads would approve a four-way interchange at Bishop Road (Tr. 1363, 1419). Fenton testified to no facts whatsoever which would support his assumption that the interchange would be constructed. He merely stated his broad general conclusion (Tr. 1465).

This is exactly the type of testimony condemned by the Fifth Circuit in United States v. Cooper, supra. There, a hydroelectric engineer named Hall testified that the highest and best use of the property in question was as part of a hydro project. The court commented, "Hall's unsupported statement that 'there was a good probability of using the Cooper lands in connection with other lands for the purpose of building a hydraulic dam there,' did not supply the lack of evidentiary facts on which the jury could make its own finding." (277 F. 2d 857, 860-861).

Fenton testified on direct that in his opinion the value of the wood did not change materially between January 8, 1960 and

April 29, 1960 (Tr. 1386). Yet he was totally unfamiliar with the status of official planning for the spur or the interchange, either as of January 8 or April 29. The spur was to become part of U. S. Interstate 90 and as such, fell within the jurisdiction of the Bureau of Public Roads. However, Fenton could not answer any questions concerning action or planning by the Bureau of Roads for the spur or the interchange (Tr. 1421-24). He was even unfamiliar with the action taken by the Federal Government, as reported in the Cleveland Press for February 17, 1960 and the Cleveland Plain Dealer of March 1, 1960 (R. 1294-95). It was the latter article which Petti read on March 1, 1960 and reported to O'Neill on that day:

"Petti phoned today and called attention to the article in this morning's Plain Dealer indicating, in his opinion, that not only the Outer Belt plans might be resubmitted to the Bureau of Roads in Washington but that the Euclid Spur might also, and that since the contract had not been let prior to January 1, 1960 of this year the whole diamond at Bishop Road might be ruled out under the new policy" (R. 1233-34).

In Exhibit 334, page 4, Fenton makes the glib assertion that "It is, therefore, assumed that this [interchange] would have been accepted by the market at that time, as highly probable." The interchanges were certainly not accepted or assumed by Petti or O'Neill as "highly probable". O'Neill wrote to the sisters on February 24, 1960, concerning the Cleveland Press article, as follows:

"The newspaper reports have indicated that while the new Bureau of Roads interchange rule is operative from January 1st of this year, it may not be enforced against interchanges already planned and where the property involved has been



acquired and the contracts let before June 30th of this year. Four months is a short time in which to work out all the problems involved in acquiring the land for the Euclid spur, agreeing on compensation and damages and getting bids submitted and contracts let, and this whole operation will involve a great deal of hard and costly work.

"It seemed most urgent that we try to get a contract for the sale of the property with a substantial down payment completed before time runs against us on this new order. If the Bishop Road interchange were dropped, I would not be surprised to see a loss of \$175,000 to \$200,000 in the value of your property.

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"Furthermore and especially in view of the risk of losing the Bishop Road exchange, I should have your long distance telephone numbers and cable addresses, and you should be available for any necessary signatures, including deeds, without any more delays than is involved in mail transport" (A.F., App. 75-77).

Fenton's client had not furnished him with the newspaper articles and he had not bothered to obtain any information concerning the interchanges. As he put it, "This is all new to me. I don't know exactly what it is" (Tr. 1422).

Fenton's opinion as to the value of Nutwood for commercial purposes, based as it was on the assumption of the interchange, (Tr. 1419) was worthless. It was based on his totally uninformed speculation as to what the Bureau of Roads might do. It was also worthless because the witness provided no factual predicate for his opinion.

The district judge's refusal to accept Fenton's opinion as to the value of Nutwood (M.D., App. 10) was clearly within the court's discretion. Any one of the grounds we urged in support of our motion to strike would have been sufficient. Together,

the legal and factual deficiencies in Fenton's opinion testimony were overwhelming. The sloppiness which characterized Fenton's valuation testimony is reflected by the witness' admission at one point that he had made "a small error of a half a million dollars" in his appraisal (Tr. 1432).

VI. THE DISTRICT JUDGE PROPERLY HELD THAT  
NEITHER HILLTOP NOR THE SISTERS STATED  
A CLAIM OF ANTITRUST VIOLATION (Spec.  
of Error 1, Op. Br. 17, 19-27)

A. Procedural Background

Hilltop alleged in its complaint filed in January, 1963 that the identical facts which, it was charged, supported fraud and breach of contract against Smith, amounted to violation of the Ohio and Sherman antitrust statutes. Gist of the asserted violations was "preventing the development of the Nutwood property as a shopping center" (R. 7-8). Smith moved in February, 1963, before any discovery was had, for dismissal of the antitrust claims on the ground that they failed to state a claim (R. 17). The district judge, in a memorandum filed on May 13, 1963, denied the several parts of Smith's motion to dismiss "without prejudice to their being again raised by defendants after the entry of a pretrial order" (R. 21, Op. Br. App. A 1). More than a year later, in July, 1964, Hilltop filed an amended complaint, which joined The Austin Company as an additional defendant as to the Sherman Act allegations only (R. 100-114). Antitrust violation was asserted to be the prevention of the development of Nutwood or some other center competitive to Severance (R. 111-112). In November, 1964, Smith filed a motion for summary judgment, directed to the antitrust claims (R. 344). Austin filed a motion to dismiss (R. 441). The

strict judge thereupon ordered Hilltop and the sisters, who had moved in October, 1964 to join as plaintiffs (R. 328), to file statement of their factual contentions. In the same order the court froze further discovery pending disposition of the pending motions (R. 530-32).

By this time, 6,066 pages of depositions had been taken, all since the court's 1963 order denying dismissal (R. 1981-2006). About 5,000 pages of this total were taken by Hilltop in Washington, D.C., Cleveland; Austin, Texas; New York and Seattle. The remaining pages consisted of depositions taken by Smith and Austin of Hilltop officials, the sisters and other witnesses. In addition, at that point, some 422 deposition exhibits had been marked. It was with the case in this posture that the district judge ordered termination of further discovery until the pending motions could be heard. Hilltop agreed to the freeze order in open court and approved for entry the ensuing written order (R. 522-23, 532). It included voluminous factual contentions (R. 651-691), in which it claimed that the conduct said to constitute an antitrust violation was prevention of the development of Nutwood and another site, Birchwood, with which neither Hilltop nor the sisters alleged any connection (R. 684). Also before the court upon the motions were a copy of the brokerage agreement between Hilltop and the sisters (R. 364-68), and excerpts from the depositions of the sisters, Edna Ashcraft (R. 369-75) and Powell (R. 383-85) and other parts of the pretrial record.

In the brokerage agreement, approved by the sisters, Hilltop agreed that it was "proceeding as a real estate broker under an exclusive listing arrangement" (R. 364-65). In their testimony



the sisters emphatically disavowed any intention of developing Nutwood themselves or even of hiring someone to develop the property for them (R. 373-74). They were adamant against getting involved in any transaction except an outright sale of the property (R. 375, 384-85).

The district judge held a day long hearing on the Smith and Austin motions on March 11, 1965. The full transcript of that hearing is in the record on appeal (R. 2235-2448). The district judge observed with respect to his earlier denial of Smith's motion to dismiss that at that time, "I was not nearly as familiar with the issues in this case as I am now" (R. 2306). As this court said in Harman v. Valley National Bank, 339 F. 2d 564, 567 (9th Cir. 1964), quoting an earlier opinion, discovery is a useful tool "'for the sifting of allegations and the determination of the legal sufficiency of an asserted claim'". By March 11, 1965 there had been discovery aplenty into every phase of Hilltop's claims.

It is thus not quite accurate to state, as Hilltop does of the trial court's action in dismissing its antitrust claims, that "the Court reversed its 1963 decision" (Op. Br. 3). Nor, in view of Hilltop's express approval of the freeze order, does it seem fitting for it to complain that the trial judge somehow cut off its discovery prematurely or improperly (Op. Br. 25-26).

#### B. The Memorandum Decision

The district court's decision of March 29, 1965, insofar as it relates to antitrust, is reproduced as Appendix "B" to Hilltop's opening brief. The court's holding was on two grounds:

1. The factual contentions of Hilltop did not state an anti-trust claim.

2. Assuming the antitrust violation as charged, the injury explained of was not proximately caused by such violation.

In view of the court's ruling, it found it unnecessary to pass the issues of "'effect in interstate commerce, the "target area" as cited by the parties, or the complicity of The Austin Company in the alleged conspiracy.'" (Op. Br., App. B6).

On April 7, 1965, the court ordered the antitrust claims dismissed (R. 950-55).

The trial court's action in dismissing the antitrust claims is correct on both of the stated grounds. Moreover, the claims are deficient in that neither Hilltop nor the sisters were within the target area of the economy, sometimes called the "target area", which would be endangered by the alleged breakdown of competitive conditions. We shall first review the record which supports the ruling that the contentions did not amount to a claim of antitrust violation, and shall then discuss together the district court's finding of no causal relation and the connected "target area" doctrine.

C. Taken at Face Value, Hilltop's Contentions Do Not State a Claim in Antitrust

Hilltop's contentions are a combination of conclusions amounting only to antitrust bromides and claims which would amount, if proved, only to common-law fraud or breach of contract. Conceding the argument, as Hilltop suggests (Op. Br. 23), that common-law breaches may also constitute breaches of the antitrust laws, it does not follow that every violation of a private right confers antitrust standing on the alleged victim. Yet, if Hilltop's contentions were held to state a claim, then most any breach of a



routine business contract could justify a treble damage trial. But the courts have refused to hold that mere allegations of breach of contract or deceit by a competitor, stated in conventional antitrust language, will state an antitrust claim. Norville v. Globe Oil & Ref. Co., 303 F. 2d 281, 282 (7th Cir. 1962); Parmelee Trans. Co. v. Keeshin, 292 F. 2d 794, 804 (7th Cir. 1962). One glaring deficiency in Hilltop's claims is that the acts complained of, even if they occurred, were not reasonably calculated to restrict the flow of interstate commerce. In the light of cases as Page v. Work, 290 F. 2d 323 (9th Cir. 1961), cert. den. 368 U.S. 875 (1961) and Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 203 F. Supp. 529 (D. Md. 1962), aff'd. 309 F. 2d 306 (9th Cir. 1962), cert. den. 372 U.S. 911 (1963), both of which were antitrust cases dismissed short of trial, it is perfectly clear that allegation of some specific facts which would show some effect on interstate commerce is essential to state an antitrust claim. Hilltop's contentions (R. 681-90), which are restated in somewhat expanded form in its opening brief (p. 5-17), do not suggest how the furnishing by Smith, without Austin's knowledge, of a non-objective report on Nutwood could have any adverse effect upon interstate commerce. Whether Smith or Austin indulge in interstate activities, as alleged (Op. Br. 6) is beside the point. For example, in the Savon case, supra, the district judge held, consistent with established doctrine, that an antitrust pleading must be tested by "... the incidence and substantiality of the alleged restraint ..., not the corporate activities of defendant...." (203 F. Supp. 529, 534). Here, the record shows that the trading and

neither Severance nor Nutwood would cross state lines (Ex. 29, p. 159, Ex. 11, Part III). Much the same arguments Hilltop makes about the possible tangential effects Smith's alleged conduct might have on interstate commerce (Op. Br. 7) were rejected by both the district judge (203 F. Supp. 533) and the Court of Appeals (309 F.2d 308-09) in Savon as to the shopping center there involved. Also see Foster & Kleiser Co. v. Special Sign Co., 85 F. 2d 742, 100 F.2d 309 (9th Cir. 1936) and Gaylord Shops Inc. v. Pittsburgh Miracle Shop, Inc., 219 F. Supp. 400 (S.D. Pa. 1963).

Hilltop's labored effort to divide the Austin-Smith relationship into four stages (Op. Br. 8-14) is apparently directed toward a single purpose, to show that Smith and Austin tried to get two department stores to locate in Severance, with the alleged purpose of making a merchandising center which would dominate the area. Clearly, this does not charge a violation of the Sherman Act. Most shopping centers built in the last few years have had more than one department store as a tenant. For example, seven of the centers listed by Smith in its Nutwood memorandum as competitive to that center had more than one department store and one of these, Southgate, had three department stores, namely, Sears, Taylor and Penney (Ex. 160, App. 160). Parenthetically, we note that Hilltop had tried since February, 1959, to land two department stores at Nutwood to provide insurance against significant competition of a regional nature" (R. 1146; Ex. 348B, reprinted in Smith Op. Br. following Ex. 22; Ex. 212A). As the court observed, and Hilltop's counsel affirmed, it was Smith's success in getting Higbee and Halle to locate in the same center which induced Hilltop to hire Smith (R. 2304). But even if all the competing department stores in

Cleveland were persuaded to locate branches in the same center that would not stifle competition. The fact of having a common landlord would not logically intensify or diminish their competition. If the same property owner rented adjacent space downtown to Woolworth and Kresge, this would raise no inference of anti-trust violation, even though the owner might boast that his "company" dominated the variety store field in the area.

Hilltop charges that it was not permitted full discovery (Op. Br. 14-15, 25). But it agreed to have the pending motions heard on the record as it was. Further, the second fatal defect which the court found in Hilltop's antitrust contentions, lack of standing to sue, was not curable by any further discovery from either San Antonio or Austin.

D. The Court Properly Held There Could Be No Causal Connection Between the Claimed Violation and the Claimed Injury

The district judge ruled that neither Hilltop nor the sisters showed in their contentions any causal connection between the claimed Sherman Act violation and the damages said to have been incurred (Op. Br., App. B3-5). The close tie between the necessity that a plaintiff establish such causal connection and that he be within the sector of the economy which would be affected by the claimed breakdown in competition is shown by the following statements of the Fourth Circuit in South Carolina Council of Milk Producers, Inc. v. Newton, 360 F. 2d 414 (1966):

"... If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4." (360 F. 2d at 418).



"The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury. If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." (360 F. 2d at 419).

The so-called "target area" doctrine was defined by this Court in Conference of Studio Unions v. Loew's, Inc., 193 F. 2d 54-55 (9th Cir. 1952), cert. den. 342 U.S. 919 (1952):

"... A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.

"Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm."

Neither Hilltop nor the sisters was within the area of the economy which would be endangered by the alleged breakdown of competitive conditions. Therefore, even assuming (1) that Hilltop stated a claim of antitrust violation, and (2) that this court reverses the district judge's finding that Hilltop failed to prove that Ridge Hills paid less than full value for Nutwood, there would still be one necessary ingredient missing from Hilltop's antitrust claims. The pretrial record before the district judge

claimed violation and the claimed injury.

In the vast majority of cases where an antitrust violation has been claimed, the plaintiff has been an active member of the relevant industry. In a few cases the plaintiff has asserted that he either had been barred from entering or forced out of an industry by the claimed monopolistic practice. Finally, in a few cases, courts have been called upon to determine the relative proximity of the plaintiff to the target area. As examples, courts have held too remote from the area, suppliers as to the industry supplied, Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 F. 2d 383, 395 (6th Cir.1962), cert. den. 372 U.S. 907 (1963); landlords as to the business of lessees, Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963), aff'd. 332 F. 2d 269 (2nd Cir.1964); patent licensors as to the business of licensees, Productive Inventions, Inc. v. Trico Prod. Corp., 224 F. 2d 678 (2nd Cir. 1955), cert. den. 350 U.S. 936 (1956); stockholders as to the business of corporations, Walder v. Paramount Publix Corp., 132 F. Supp. 912, 916 (S.D.N.Y. 1955); and labor unions and their members as to the business of the members' employers, Conference of Studio Unions v. Loew's, Inc., supra.

In the face of these holdings, how can anyone seriously argue that the claim that Smith and Austin conspired "for the purpose of preventing the development of competitive regional shopping centers in the eastern suburbs of Greater Cleveland, including those at Beachwood and at the subject Nutwood property" (Op. Br.8-9) is somehow proximately related to Hilltop's alleged failure to earn a bigger brokerage commission than the \$56,580.75 it received on the sale to Ridge Hills? (R. 1238). Hilltop did not pretend to



been in or to have been barred from the shopping center business. And if it be looked upon as a supplier of services, persons supplied were not in the shopping center business disclaimed any intention of going into it. Hilltop, therefore, has no conceivable standing to win treble damages for the alleged violation, even if properly stated.

Nor were the sisters in any better position. They were not in the shopping center business. They had no intention of developing Nutwood Farms themselves for any purpose. How can it be alleged that they are proximately injured by conduct claimed to restrain competition in "regional shopping centers in the eastern suburbs of Cleveland?" At the very most the sisters might be directly or incidentally injured. Several of the theoretical development plans for development of Nutwood pictured restaurants, gas stations, motels, bowling alleys, medical buildings and supermarkets (Ex. 235, plate following p. 4, 212 A, 211A). Would this give the sisters a claim to treble damages if competition broke down in the restaurant, gas station, motel, bowling alley, medical or grocery business in eastern Cleveland? Hilltop and the sisters were unable to prove in a full trial that Nutwood had any potentiality as a shopping center (O.O., App. 5), or that the property could be valued as such (M.D., App. 10). But even had they proved Nutwood to have great potentiality for such purpose, they would still have lacked requisite standing to sue.

The argument of Hilltop and the sisters all proceeds from the false premise - that the "target area" doctrine requires only that the plaintiff allege that defendant's conduct is aimed at injuring the plaintiff. Of course, if this were so, every plain-

tiff who asserted breach of contract could state a treble damage claim, on the ground that the defendants' conduct was aimed at him. But the "target area" doctrine requires more -- that the alleged injury be proximately caused by the claimed antitrust violation.

Hilltop has cited Harman v. Valley National Bank, 339 F.2d 564 (9th Cir. 1964) (Op. Br. 20-21). The Harman case has, I think, little to do with the instant problem. In that case the complaint was dismissed at the outset. Here, the district court refused such dismissal. Instead he acted only after two years of discovery, including some 5,000 pages of depositions by the plaintiffs, and after the plaintiffs were afforded an opportunity to state detailed factual contentions. In Harman this court upheld that the course followed in the instant case was the one to follow by quoting the words of Judge Barnes that "a rule to dismiss is not 'the only effective procedural implement of the expeditious handling of legal controversies'". (339 F.2d 567).

In Harman this court did refer to the "target area" doctrine and cited Pollock, The "Injury" and "Causation" Elements of Treble-Damage Anti-Trust Action, 57 Nw. U.L.Rev. 691 (1963). In that article, Pollock, a former government antitrust lawyer states:

"... With rare exceptions, the courts have 'drawn the line', explicitly or otherwise, so as to limit the treble damage remedy to plaintiffs in the 'target area'". (57 Nw. U.L.Rev. 691 at 704).

Peller v. International Boxing Club, 227 F. 2d 593 (7th Cir. 1955); Duff v. Kansas City Star Co., 299 F. 2d 320 (8th Cir. 1962) and Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill 1964).

The district judge, during the March 11, 1965 argument on titrust, summed up well the situation shown by the pretrial record. When counsel for Hilltop charged that Smith issued a false report to us, who would have challenged their dominance ..."

The following colloquy occurred:

"THE COURT: Oh, no, you were not about to challenge their dominance at all. You wanted to sell your property to somebody else who might challenge it.

"MR. STEPHAN: Well, not quite, your Honor. I think really that what you raise is a good point and it needs clarification. It needs a good deal of clarification, because the letter --

"THE COURT: Your sisters said definitely, from all that appears here before me now, that they just weren't interested in getting into the shopping center business.

"MR. STEPHAN: Your Honor, that is not disputed, in the light of their then hindsight."  
(R. 2297-98).

Neither Hilltop nor the sisters stated or could state a Sherman Act treble-damage claim. Since, as Hilltop observes (p. Br. 5-6), the requirements of standing under the Ohio anti-trust law, known as the Valentine Act, are at least as onerous under the Sherman Act, it follows that neither Hilltop nor the sisters could state a double damage claim under the Ohio Act. Their lack of standing, whether based on a proximate causation or target area analysis, is fatal.

## VII. CONCLUSION

Unless this court should hold that the findings assailed on



this appeal (Op. Br. 17-18) are clearly erroneous, it need not consider the antitrust claims. Failure of Hilltop to offer substantial evidence that the Smith analysis was wrong or that it damaged anyone is dispositive of this appeal.

Hilltop has ballooned out of all proportion the fact that Hilltop was not told that Smith had started negotiations with Austin which, if successful, would make Smith owner or part owner of Severance. As O'Neill wrote, before Smith was hired, "Treiger emphasized the possible conflict of interest between his firm's loyalty to Austin and Severance and any recommendations he might make to the promoters of the Nutwood project." Nevertheless, O'Neill wrote, "it was considered worth while to get Smith's survey and recommendations." (A.F., App. 48). It seems to us entirely illogical to suggest that Hilltop would not have hired Smith if it had known of the Austin negotiations. In its answering brief, Hilltop asserts, "Petti knew nothing of the impending Smith purchase, but thought Higbee and Halle's location at Severance was an accomplished fact because of the February 22, 1959 newspaper announcement." (Ans. Br. 19). Petti always held the view that Severance, which he thought an accomplished fact, and Nutwood were non-conflicting projects (Petti Tr. 289-96, 320-22). He believed that Severance was in the carriage trade suburbs and Nutwood was in a distinct working class area (Tr. 293). When Treiger told Petti in September, 1959, before Smith was hired, "that we are working on the Longwood [Severance] property and felt there might be some conflict in our own position", Petti replied, "that he did not think that there would be because he did not think that his

property would pull very far from the west." (A.F., App. 44) (emphasis added). In June, 1961, some eighteen months after receiving the Smith study, Petti had not modified his view. He wrote to David May, "I see little conflict [with Cedar Center] as each of the trading areas is distinct in itself" (A.F., App. 88). If Nutwood did not conflict with Cedar Center, it would not conflict with Severance (See plate 1, Smith Op. Br.). Obviously, it is a mistake to Petti and O'Neill that Smith, in addition to its full loyalty to Severance as advisor to Austin, might also purchase this non-competing property, would not have deterred them from hiring Smith.

For the reasons herein stated, the district judge's findings attacked by Hilltop should be upheld. Further, his action in dismissing the spurious antitrust claims advanced by Hilltop should likewise be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

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LARRY P. SMITH, et al., Appellants,

vs.

HILLTOP REALTY, INC., et al., Appellees,

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HILLTOP REALTY, INC., et al., Cross-Appellants,

vs.

LARRY P. SMITH, et al., Cross-Appellees,

and

THE AUSTIN COMPANY,

Additional Cross-Appellee as to Count No. 4 Only.

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ON CROSS APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

---

ANSWER BRIEF OF THE AUSTIN COMPANY CROSS-  
APPELLEE AS TO COUNT NO. 4 ONLY

---

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FEB 13 1967

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February 13, 1967



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February 13, 1967





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UNITED STATES COURT OF APPEALS  
For the Ninth Circuit

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vs.		)	
P REALTY, INC., et al.,	Appellees,	)	
<hr/>		)	
		)	NO. 21207
P REALTY, INC., et al.,	Cross-Appellants,	)	
vs.		)	
P. SMITH, et al.,	Cross-Appellees,	)	
and		)	
AUSTIN COMPANY	Additional Cross-Appellee,	)	
	as to Count No. 4 only.)	)	
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ON CROSS APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT OF THE  
WESTERN DISTRICT OF WASHINGTON

---

ANSWER BRIEF OF THE AUSTIN COMPANY CROSS-  
APPELLEE AS TO COUNT NO. 4 ONLY

---

I. INTRODUCTORY STATEMENT

This case involves the sale price of a parcel of unimproved  
land. The original Complaint was filed January 4, 1960, by  
P Realty, Inc., a real estate broker, commissioned to sell the  
The defendants were the partners of Larry Smith and Company,  
estate consulting firm which had been retained by the broker  
to submit an economic report on the best use of the land. The



Complaint charged that Larry Smith and Company was guilty of fraud in failing to disclose its position as potential owner and developer of a shopping center some 7 straight line miles away, and that the economic report was false. The Complaint charged that because of the alleged false report, the broker affected the sale of the land for less than it now claims it might have been worth.

Counts 3 and 4 of the Complaint alleged violation of the Ohio and Federal Anti-Trust Laws by the Smith partners.

In July of 1964, more than four years after the acts complained of took place, the First Amended Complaint was filed and The Austin Company was named as an additional defendant as to Count 4 only, i.e., alleged violation of the Sherman Act. After extensive pretrial discovery, the District Court granted The Austin Company's Motion to Dismiss and the other defendants' Motion for Partial Summary Judgment, thereby eliminating Counts 3 and 4 of the First Amended Complaint.

The trial below involved only Counts 1 and 2 for false market report and breach of contract. The Austin Company was not in that trial.

The facts are relatively few and undisputed, and are nearly contained in the agreed Statement of Facts, pleadings and pretrial depositions.

Throughout this brief, for the most part, cross-appellant Hilltop Realty, Inc., will be referred to as "plaintiff"; cross-

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llee, The Austin Company, will be referred to as "Austin", the other cross-appellees, referred to as "Smith", or "Smithendants."

## II. STATEMENT OF THE CASE

Mr. Severance Millikin was the owner of a 151 acre residential estate located in Cleveland Heights, Ohio, in the middle of densely populated area, 7 straight line miles East of downtown Cleveland, Ohio. In 1954, Mr. Millikin retained The Austin Company, engineering and construction firm, with headquarters in Cleveland, have the property rezoned for commercial purposes, with the end view of using the property for a shopping center and other commercial purposes. A taxpayers' suit was brought, attacking rezoning, but the rezoning was finally upheld on December 18, , by the Supreme Court of Ohio (R. 1061). After the original zoning in 1954, title to the property was transferred to a new corporation, Severance Estate, Inc. (R. 1062), in which The Austin Company held a 75% interest and Millikin 25% (R. 1080, 1152).

In May of 1955, The Austin Company retained Larry Smith Company, a well-known developer of shopping centers, to act as their consultant in connection with Severance (R. 1069). From the beginning of their association, both Smith and Austin, in planning the development of a shopping center on the property, went out to obtain long term leases from two of the three largest

department stores in Cleveland (R. 1199-1201). One of such stores was The May Company, which chose a different site in 1958, less than two miles from Severance (R. 1219), but the other two, The Halle Bros. Company and The Higbee Company finally agreed to execute such long term leases for branch stores in the Severance Center (R. 1153-54). Severance Millikin sold his interest in the Severance property to Austin, and, thereafter, in May of 1958, Austin decided that it was not equipped to develop a shopping center due to lack of personnel familiar with that field of endeavor. Accordingly, Austin decided to sell the Severance property and asked Smith to find a buyer (R. 1133).

In December of 1958, Smith considered buying the property for its own account, and in January of 1959, began exploring the possibility of financing such a venture (R. 1147, 1152). On February 22, 1959, the Cleveland newspapers announced that The Halle Bros. Company and The Higbee Company would build branches in the shopping center to be known as Severance, and were negotiating contracts to this end with The Austin Company (R. 1153-54). On December 23, 1959, The Halle Bros. Company and The Higbee Company leases were executed (R. 1207), and Cleveland newspapers published these facts on December 29, 30 and 31, 1959 (R. 1208-11). Active negotiations between The Austin Company and Smith began July 31, 1959 (R. 1180).

On February 10, 1960, Smith and Austin executed an agreement which in effect gave Smith an option to purchase Severance, purchase being contingent on Smith being able to obtain proper financing (R. 1225-26). No publicity was given the agreement pending Smith's arranging its financing (R. 1229-30). In course this was arranged, and on July 21, 1960, the Cleveland Press announced the start of the Severance Shopping Center with Smith as the owner and developer (R. 1244). Part of the agreement between Austin and Smith, provided for design, engineering and construction of the shopping center, and other buildings, by Smith (R. 1245).

Severance Shopping Center is located in one of the older sections of Cleveland and was designed to cater to the residents of Shaker Heights, Shaker Heights, University Heights, Lyndhurst, and other so-called upper class, white collared areas (R. 1246-67).

To the northeast of Severance, 7 straight miles, or 9 miles by road, was located the Nutwood Farm on which was the original residence of a Mr. Charles Devereaux (Smith opening brief, Plate I). Nutwood Farm was partly in the Village of Wickliffe and partly in the Village of Willoughby Hills (R. 1056). The original house and farm buildings, and some of the land, had been sold (R. 1055-56). The granddaughters of Mr. Devereaux, known as the Winslow Sisters



sought to sell the remaining 175 acres (R. 1056). Hilltop Real Inc. was retained for this purpose in 1958 (R. 1137-39). Hilltop entered into a supplemental agreement with the granddaughters of Mr. Devereaux on July 22, 1959, setting the sale price at \$3,500 per acre (R. 1168-69).

In September of 1959, Mr. Petti, the President of Hilltop, having become familiar with Larry Smith and Company's reputation as shopping center developers, sought to retain Smith to help with the sale of Nutwood Farm (R. 1188). By December 5, 1959, a contract between Hilltop and Smith was agreed upon, under which Smith agreed to prepare an economic report on the feasibility of Nutwood Farm as a shopping center site (R. 1202). No contention is made that Austin participated in, or had any knowledge of Smith's connection with Hilltop, and no contention is made that Austin had heard of Nutwood Farm as a proposed shopping center site.

Smith had agreed to prepare its report on Nutwood Farm at a cost of \$4,500 (R. 1189). When it became apparent from Smith's preliminary findings that the conclusions would be negative it was agreed that Smith would furnish a memorandum instead of formal report. The charge was reduced to \$2,920. The memorandum was mailed to Hilltop on January 8, 1960 (R. 1212).

Following the announcement of Smith as the developer of Severance, in July of 1960 (R. 1244), Hilltop complained to Smith



ut the contents of Smith's report in light of Smith's interest Severance, since in the meantime Hilltop had sold Nutwood Farm \$3,500 per acre (R. 1238). Nearly two and one-half years er, Hilltop, having obtained an assignment from the Winslow ters of their rights against Larry Smith and Company only, filed original Complaint in this action, on January 4, 1963. Ex- stive discovery proceedings followed, including the taking of deposition of L. Paul Gilmore, Chief Financial Officer of The tin Company, who was primarily in charge of the Severance Pro- t for The Austin Company. It was brought out at that time t The Austin Company had no knowledge of Smith's connection h Nutwood Farm, or even the existence of it. The prayer in the ginal Complaint was for \$1,312,500, all premised on the claim t the Smith report was false and misleading, and caused Hilltop lty, Inc. to sell Nutwood Farm for \$3,500 per acre, instead of some higher figure.

On July 24, 1964, an Amended Complaint was filed, naming Austin Company as an additional defendant, as to Count 4 only, the prayer in the Complaint was increased to \$8,862,500.

From the beginning, as a party in this case, it has been tually impossible to determine just what Hilltop claims Austin as a conspirator, in violation of the Sherman Act, since it is claimed that Austin had any connection with, or knowledge of, intiff, Nutwood Farm, or Smith's alleged false report. What is

it then that appears in the various documents as acts committed by Austin in any way affecting plaintiff, or its assignors? The claims are few and wholly irrelevant.

The first, and most frequently stated, is that The Austin Company "conspired" with Larry Smith and Company to "marry the competition".\* (Cross. App. Br. 9). No matter how many times the expression is repeated, or in what context it is used, all it means is that The Austin Company sought and succeeded in obtaining 2 year leases for branch stores in the Severance Shopping Center from two of the three largest department stores in the City of Cleveland, a normal, accepted objective of every developer of a successful shopping center.

What next is claimed? That Austin had knowledge of Larry Smith preparing "slanted" reports for submission to the department stores (Cross. App. Br. 10). Plaintiff attached great significance to some sinister, or illegal, aspect of this fact. As testified by Austin's Mr. Beatty, whatever was intended by the use of the word "slanted", was:

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\* This phrase appeared in an early letter from Smith to The Halle Bros. Company. The full sentence reads, "Many of the department stores with whom we work have accepted the principle of 'marrying the competition' just as you have done in Westgate" (Westgate is a shopping center west of Cleveland, containing two major department store branches.)

"It means that each report would then have in it the economic facts that were of interest to the particular person for whom the report was being prepared \* \* \*." (Beatty Deposition, p. 171).

Next, The Austin Company is charged with conspiring to prevent the risk of a third shopping center development taking place (Cross App. Br. 10). It must be remembered that The Halle Bros. Company, The Higbee Company and The May Company, the three largest department stores in the Cleveland Area, were fierce competitors, and particularly The Halle Bros. Company and The Higbee Company. They all catered to the same clientele. The market to be reached by each, if it was to establish a sizeable branch in the so-called eastern suburbs of Cleveland, included the Cities of Shaker Heights, Cleveland Heights, University Heights, Beachwood, Pepper Creek and Lyndhurst, as the principal ones.

The May Company had eliminated itself as a prospective competitor at Severance by establishing a large branch store in University Heights, in an existing shopping center, less than a mile and one-half from Severance, and readily accessible from all of these suburbs. So that the context can be understood, The May Company's location was the second shopping center site, if Severance was to be considered the first. What, therefore, was the third? This was a proposed development by Visconsi and Ratner, at the corner of Shaker Boulevard and Richmond Road in Beachwood, Ohio.

The Halle Bros. Company considered building at Beachwood (Walter M. Halle Deposition, pp. 22, 23, 35, 36 and 51). The only references to this third development taking place, or being prevented, as plaintiff charges, appear in statements by representatives of Smith to the effect that if The Halle Bros. Company would agree to go into Severance with The Higbee Company, Beachwood would probably never get off the ground. It must be remembered, however, that Hilltop is not the developer of Beachwood, and the developers of Beachwood have not sued anyone. These references all took place prior to August 2, 1958, when Hilltop was first retained to sell the Nutwood Farm. Yet Hilltop constantly charges The Austin Company and Larry Smith and Company with concurrent conspiratorial acts to "prevent the development of Beachwood and Nutwood Farm".

Next, and the only other charge of conspiratorial acts is that The Austin Company, with Larry Smith and Company, set out to create a shopping center that would dominate the eastern suburb of Cleveland. The only evidence of this proposed domination appears in interoffice memorandum by Mr. Trieger of Larry Smith and Company in 1956, in which he states his personal opinion as follows:

"Of course, the less department space the landlord has to build, the better off he would be from a financial or investment standpoint, as long as there is enough department store space to dominate the east side and to allow the project to operate successfully."  
(Ex. 260, p. 13, November 19, 1956).



These are normal business activities in the shopping  
er development field. As plaintiff's President, Mr. Petti,  
ified;

"There are just so many major tenants in a given area that could provide the impact to build a true regional center, and when Higbee's and Halle's were taken away from the regional market, so to speak, and put at Severance, then it lessened the possibilities of others going in other areas." (Second Petti Deposition, p. 138-139).

Hilltop's own President never considered Severance as in  
same trading area as Nutwood Farm, and retained Smith, primarily,  
use it had done such a good job for Austin in the original develop-  
of Severance. Hilltop's President, Petti, testified in his  
t deposition, before Austin was made a defendant, as follows:

"My interpretation was that Larry Smith's job had been done. Higbee's and Halle's had been secured; Severance had become a fait accompli, so to speak, and I thought they were ready for another job." (Petti First Deposition, pp. 225-226).

\* \* \* \*

"The fact that Larry Smith had done the Severance report, I think, was discussed, and I think I liked the idea that Larry Smith had done the Severance job, because, once again, I felt that they had done a thorough job in that area; they got very wonderful results at Severance, and would have been familiar with the overall northeastern Greater Cleveland area in which we had our interest.

"\* \* \* it might be that Homer Hoyt had done work for the Ratners, and we felt we were more in conflict with their centers at Shoregate and Goldengate than we were at Severance, and it was always our thinking that we were in an entirely different trading area, being that it was in what we call the blue collar class as against Severance,



which is in the little higher area. So, with this argument, I think it was my feeling that prevailed, and we went ahead with Larry Smith.

"Q. It was your opinion that Severance was not within the Nutwood trade area; is that correct?

"A. \* \* \* I felt that they were on each other's border but they were not in the same trading area." (First Deposition, pp. 230-232). (Emphasis added).

This is the testimony of Mr. Petti, the President of plaintiff Hilltop Realty, Inc.; he was the managing executive of plaintiff and represented plaintiff's only contact with Larry Smith and Company. (Plaintiffs never had, and do not claim, any contact with The Austin Company prior to July, 1964, when they joined The Austin Company as a defendant in this lawsuit.) This testimony Mr. Petti was given before that date, and he testified that Severance and Nutwood were so located that they were not competitive with each other -- they were not in the same trading area.

The foregoing, then, represents plaintiff's claim against The Austin Company under the Federal anti-trust laws. These Federal anti-trust contentions are the only basis for a claim of jurisdiction over The Austin Company in this case.

### III. PROCEEDINGS IN THE DISTRICT COURT AND THE DISTRICT COURT'S DECISION

The First Amended Complaint, joining The Austin Company as an additional defendant as to Count 4 only, was filed July 24, 1964 (R. 100). We will not burden this Court with a review of the voluminous record of pretrial discovery proceedings, motions

ings and briefs. Suffice it to say the Smith defendants  
ed a Motion for Partial Summary Judgment (R. 344), and The Austin  
pany filed a Motion to Dismiss, raising four issues: first,  
t the First Amended Complaint was filed more than four years  
er plaintiff, Hilltop, had full knowledge of all relevant facts  
ating to the claimed anti-trust cause of action; second, that  
ltop had no standing to sue since it stood only as an assignee  
the Winslow Sisters' assignment of their false report and  
ach of contract claims against Smith\*; third, that the Court  
no jurisdiction over The Austin Company, since the First  
nded Complaint did not allege facts constituting a cause of  
ion under the Sherman Anti-Trust Act; fourth, the First Amended  
plaint failed to state a claim against The Austin Company upon  
ch relief could be granted (R. 441).

On December 14, 1964, the District Judge ordered Counsel  
Hilltop to file a detailed Concise Statement of Factual Conten-  
ns (R. 530). Such document was filed (R 651), consisting of

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In October of 1964, Hilltop filed a motion to have the Winslow  
Sisters joined as parties plaintiff because of a fatal defect  
in Hilltop's claim against the 18 new parties defendant in the  
First Amended Complaint, including Austin. So far as Austin  
is concerned, its Motion to Dismiss was granted and we will  
refer to Hilltop, only, as "plaintiff", because the Winslow  
Sisters were permitted to become parties after Austin was  
dismissed from the case.

39 pages (larded with conclusions of law and fact). The District Court, in his Memorandum Decision of March 17, 1965 (R. 794) and Amended Memorandum Decision of March 29, 1965 (R. 827), accepted true plaintiff Hilltop's factual contentions and all reasonable inferences to be drawn therefrom, and held;

" \* \* \* these facts do not state a cause of action under the antitrust laws." (R. 829)

He then stated;

" \* \* \* plaintiff shows no causal connection between the restraint of shopping center competition and its claim of injury." (R. 829)

The Court then said:

"In view of this disposition of the case the Court finds it unnecessary to decide the issues raised relative to the statute of limitations, the effect on interstate commerce, the 'target area' cases cited by the parties or the complicity of The Austin Company in the alleged conspiracy." (R. 831)

The District Court dismissed The Austin Company from case (R. 950).

The case later went to trial against the Larry Smith partners and others, on Counts 1 and 2, which consisted of a claim of fraud and breach of contract in connection with the Smith repurchase of Nutwood Farm. The decision in that portion of the case is now before here on appeal by both plaintiff and defendants, and plaintiff has also appealed the earlier decision dismissing The Austin Company from the case. The decision on that part of the case which went to trial holds, in part:

"The Court has not been persuaded that the conclusions reached in the Nutwood Market Analysis were wrong.

\* \* \* the Court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. \* \* \*" (Written Memorandum Decision of 10-27-65 (R. 1469-70)).

We agree with the District Court's findings that the Smith report was not false and plaintiff has suffered no damage, but we do not understand the award of punitive damages, and attorneys' fees, totaling \$150,000.

#### IV. THE ISSUE PRESENTED

Did the District Court err in granting The Austin Company's Motion to Dismiss?

#### V. ARGUMENT

##### A. THIS IS NOT A FEDERAL ANTI-TRUST CASE.

1. The Austin Company committed no acts forbidden by the Federal Anti-trust Laws.

As the District Court put it, after accepting as true all the plaintiff's factual contentions and reasonable inferences to be drawn therefrom;

"It appears that plaintiff's basic complaint is the submission to it by Smith of a false market analysis report which caused Hilltop and the Winslow Sisters to sell the Nutwood property at a price substantially below that which they could have obtained if they had sold it for shopping center development." (R. 828)

Similarly, the nub of Hilltop's claim appears at the top of page 16, of cross-appellant's (plaintiff's) brief, as follows:



"Smith's false report on Nutwood deprived Hilltop of the one essential ingredient to developing another regional shopping center." (Emphasis added).

Not only does this "one essential ingredient" have not to do with Austin, but the District Court found, as a fact, that Smith's report on Nutwood Farm was not false, and that Hilltop failed to prove any damage.

How then does Hilltop try to state a case under the Federal Antitrust Laws against Austin? The principal charges against Austin relate to the period from April of 1955 to February of 1959, and solely to a few phrases lifted out of documents obtained on discovery prior to Austin's being made a defendant in this case and summarized in Hilltop's factual contentions, p. 32, as follows:

"During this period they conspired to dominate the relevant market through persuading Higbee's and Halle's by slanted report 'to marry the competition' and divide the market so as to eliminate potential competition from other shopping center sites\* and by taking all possible steps to 'avoid the risk of a third development taking place' so as to dominate the entire Eastside of Cleveland." (R. 684-85)

The only other acts on the part of Austin about which

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\* " \* \* \* so as to eliminate potential competition from other shopping center sites \* \* \*." This is the basic flaw in Hilltop's charge. The "competition" is between "sites", i.e., parcels of real estate in different locations. Austin persuaded The Hahn Bros. Company and The Higbee Company to choose Severance as the "site" where they would locate their east side branch stores.



plaint is made are its execution of leases with The Halle Bros.,  
any and The Higbee Company in December of 1959, selling the  
erty to Smith in 1960, and, in order to assist the financing  
he Severance Center, loaning Smith funds for which it  
ived a second mortgage and an interest in the shopping center.

If Hilltop, or the Winslow Sisters, have any valid claim  
damages against The Austin Company for violation of the Sherman  
on the undisputed facts in the instant case, then every owner of  
erty in the eastern suburbs of Cleveland, or real estate broker,  
an exclusive sales agreement from such owner who believes such  
e of property is a potential shopping center site, also has a  
e of action against The Austin Company, on the ground that  
Austin Company obtained leases for branch stores from two of  
three major department stores in the City of Cleveland, result-  
in a strong and successful shopping center at Severance, thereby  
enting every other property owner from doing the same thing.

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides:

"Every contract, combination \* \* \* or conspiracy  
in restraint of trade or commerce among the several  
states \* \* \* is hereby declared to be illegal."

It is our understanding of the law that a "conspiracy" is  
entering into an agreement to do an unlawful act, with an evil  
ose, with knowledge that the act is unlawful, and that a  
piracy includes as an element, a corrupt motive. Conspiracy

is a plan to commit either a crime or an evilly designed scheme or confederacy to cause civil injury. (8-A, Words and Phrases, 386-387).

Normal conduct in planning a shopping center developme  
is no such conspiracy.

2. Even if it was assumed that illegal acts took place, plaintiff has no claim under the Federal Anti-trust Cases.

Section 4 of the Clayton Act (15 U.S.C. §15) under whi  
plaintiff does and must make its claim, provides:

" \* \* \* any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor \* \* \*." (Emphasis adde

The "business or property" of the plaintiff was that o  
a real estate broker who would be entitled to a commission if it  
sold Nutwood Farm. The Winslow Sisters' "business or property"  
was the ownership of a piece of real estate, Nutwood Farm.

The "business or property" of Hilltop was not "establi  
ing a shopping center". It was a real estate broker. As Mr. Pe  
President of Hilltop, testified (First Deposition, p. 239):

"No. We had no owner, no title, no equity in the property. No; we were strictly a broker."

Likewise, the "business or property" of the Winslow Sisters was not establishing a shopping center. They had no int  
tion of doing so. As testified by Mrs. Ashcraft (Deposition, p.  
261):

"Never had any intention of developing the property ourselves."

as testified by Mrs. Powell, (Deposition, p. 67):

"We discussed the fact that there was this thing about developing it ourselves, and we threw that around a bit, but we absolutely decided against it even before this."

The only "business" which plaintiff could possibly claim been affected by any illegal conduct was the hope to sell the Good Farm to someone who would establish a shopping center on property. Likewise, the only "property" involved was Nutwood and the only effect on it was the failure to realize the increased value for the property which plaintiff hoped would result if some purchaser would pay more money for the property as a part of a planned venture to build a shopping center. There was no injury to the property, but only to plaintiff's hopes with respect to what some would-be prospective purchaser might want to do with the property and hence pay more money for it. Plaintiff (cross-examination) states its entire case as follows (P. 16 of Opening Statement):

"If Hilltop had received a true report, it would have been able to sell the property to others at its true value\* for a promising regional shopping center site; or, alternatively, to have developed the property,

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In finding no damage as a result of the report, the court determined the "true value" to be just what plaintiff's received for it and nothing more.

together with the owners or others, by attracting a major and/or junior department store and the other satellite tenants which support a regional shopping center (R. 689)."

Plaintiff's claims involve only prospective economic advantage and the courts have not permitted recovery on this basis, holding that mere expectations and hopes are not the type of legal interest protected by Section 4.

The District Court in dismissing the contract cause of action, put it this way:

"The plaintiffs also contend that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture." (R. 1470)

In Broadcasters, Inc. v. Morristown Broadcasting Corp.

185 F. Supp. 641 (D.C.D. N.J. 1960) the Court said at pages 644

"The claim for damages under Section 4 of the Clayton Act, supra, must fail for a further reason: the plaintiffs have failed to allege facts from which it may be inferred that they have sustained an injury to 'business or property'. The pertinent provision of the Act affords a remedy to 'person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.' (as stated by the Court). The term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise. Peller v. International Boxing Club, 7 Cir. 2593, 595 and 596; Image & Sound Service Corp. v. Alter Service Corp., D.C., 248 F. Supp. 237, 239; Brownlee v. Malco Theaters, D.C., 99 F. Supp. 312, 316 and 317. The plaintiffs were not engaged in a commercial venture or enterprise at the time this suit was brought; they entertained nothing more than an expectation that they would be so engaged if the license were granted. Ibid. The claim for injunctive relief must fail for the same reason."



5), at page 596:

"Plaintiff's testimony reveals further that he has sustained no injury to any property right. The construction most favorable to him which can be placed on his testimony is that he entered into a series of separate negotiations which might have ripened into advantageous agreements under which the proposed fight could have taken place. Assuming the allegations as to defendants' conspiracy and as to its effect on the negotiations to be true, and assuming that, except for the conspiracy, plaintiff's negotiations would have been successful, these assumptions cannot aid plaintiff's cause, it appearing affirmatively that he was not injured within the contemplation of the statutory provisions, inasmuch as no property rights could accrue to him in the premises until and unless he succeeded in obtaining the several contractual relationships for which he was negotiating. Cf. Biglow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and cases there cited and discussed."

See also Duff v. Kansas City Star Co., 299 F.2d 320, 325

A. -8, 1962) and American Infra-Red Radiant Co. v. Lambert

Industries, Inc., 360 F.2d 977, 995-996 (C.A. -8, 1966).

3. Interstate commerce is not involved here --  
The Federal Anti-Trust Laws are not applicable.

All we have in this case is a local transaction unrelated to interstate commerce. It has been uniformly held that real estate transactions are local in nature and not covered by the Federal Anti-Trust Laws. See for example, Gaylord Shops, Inc. v. Pittsburgh  
Circle Mile Town and Country Shopping Center, Inc. and J. C. Penney  
v. J.C. Penney Co., Inc., 219 F. Supp. 400 (1963). In that case, the  
plaintiff, a tenant in a shopping center, brought an anti-trust



action under the Clayton Act against the owner of the center and J. C. Penney Co., a tenant in the center. The shopping center and defendant J. C. Penney Co. were parties to a written agreement under which J. C. Penney Company could prevent additional space being rented to other tenants. Plaintiff was refused space pursuant to this agreement and sued both the shopping center and J. C. Penney Company for damages under the anti-trust laws. It was conceded that J. C. Penney Company was engaged in interstate commerce, but the Court held that the complained of acts did not occur in the course of interstate commerce. As the Court stated at page 403:

"All of the subject real estate was situate in Pennsylvania, and, of course, did not move in interstate commerce. under the broad terms of the Sherman Act, real estate transactions have been held to be strictly local in nature and we do not think that the fact that the leases here involved were executed outside Pennsylvania calls for a different conclusion. Similarly, we are convinced that the discrimination to which plaintiff was subject did not occur in the course of interstate commerce." (Emphasis added.)

A recent decision by the United States Court of Appeals for the Second Circuit is also pertinent. See Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (1964). In that case, the plaintiff had an agreement with one defendant to build a building and lease it, with land, to the defendant. The defendant terminated the agreement. Plaintiff sued all of the defendants under the anti-trust laws, claiming a "conspiracy" among the defendants,

the acts were done for the "express purpose of stopping the  
of bowling alley equipment and material in interstate commerce".  
Court held that the complaint did not establish Sherman Act  
ations either (i) "based on acts occurring in interstate  
erce" or (ii) "through local acts having a substantial effect  
interstate commerce." As stated in paragraph 4 of the editor's  
abus:

"Complaint containing allegations that defendants entered into a conspiracy to stop the interstate flow of bowling alley equipment and material into a city in New York to prevent completion of a bowling alley which would have competed with other bowling alleys in the city was insufficient to state a cause of action under the Sherman Act based on local acts having a substantial effect on interstate commerce. Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2." (Emphasis added.)

tated by the Court at pages 270-271:

"The amended complaint alleges that the Plattsburgh area draws bowling alley trade from Vermont and Canada and contains additional averments, as summarized by the district judge, that:

'a. the building leased by plaintiff to North Country had been erected, the equipment had not yet been installed, and the lease included a percentage of the returns to be received from the bowling business and from the sale of items of merchandise (presumably food and beverages principally);

'b. bowling alleys in Vermont and Canada compete with those in the Plattsburgh area;

'c. North Country actively solicited the patronage of bowling leagues in Vermont and Canada;

d. North Country advertised in Canadian and Vermont Newspapers, soliciting customers in Canada and Vermont to come to Plattsburgh to bowl and "used radio and television media" (it is not stated where) also to solicit such customers;

'e. North Country and the other defendant operators of bowling alleys brought, or intended to bring, into Plattsburgh bowling alley equipment which moved in (or would move) in interstate commerce from outside New York;

'f. the equipment "scheduled to be brought into Plattsburgh" in interstate commerce was substantial and included "kitchen and service equipment";

'g. the "equipment, supplies and appurtenances being brought to Plattsburgh were items of interstate commerce for delivery to the ultimate consumer" (which seems strange, considering the nature of a bowling business);

'h. the equipment for the 32 alleys in the building of plaintiff, which was to be in interstate commerce, did not arrive;

'i. the merchandise to be sold by North Country in the premises, which was to be in interstate commerce, did not arrive;

'j. competition with bowling alleys in Canada and Vermont was lessened;

'k. the flow of bowling alley equipment in interstate commerce was restrained; and

'l. defendants acted "for the express purpose" of stopping the interstate flow of "bowling alley equipment and material" into Plattsburgh." 221. F. Supp. at 686-87.

"The District Judge held that, even assuming the truth of these allegations, as he was required to do in passing on the motion to dismiss, the plaintiff did not sufficiently allege a restraint of interstate commerce. V agree."

"We hold that the complaint does not establish a Sherman Anti-Trust Act violation based on acts occurring in interstate commerce."

page 273:

"We hold that the complaint does not establish a violation of the Sherman Anti-Trust Act through local acts having a substantial effect on interstate commerce."

Hilltop argues that certain materials used in the construction of the Severance Shopping Center might have come from outside the State of Ohio, and, therefore, that the construction of the Center involved interstate commerce, subject to the Sherman Act. It has been uniformly held that items coming from outside of a state are to be in the flow of interstate commerce within the Sherman Act once they have come to rest within the State. See Woodmere, Inc., 217 F.2d 148 (CA 4, 1954) where the plain- tiff alleged violation of the Sherman Act by defendants through their excavations on vaults to be installed in defendants' cemeteries. The District Court granted the defendants' motion to dismiss on the ground that there was no interstate commerce involved within the meaning of the Sherman Act. The Court of Appeals affirmed, at page 149:

"We come first to the contention of plaintiffs that interstate commerce under the Sherman Act is here involved because plaintiffs import from without West Virginia some of the materials which



they use in the manufacture of their burial boxes and vaults. This contention seems to be quite lacking in merit. Certainly, it finds little or no support in the decided cases."

And at page 150:

"Equally without merit is plaintiff's argument that the Sherman Anti-Trust Act may be invoked on the ground that interstate commerce is involved because some of the metal vaults sold by them in West Virginia had, at some earlier time, been brought into West Virginia from some other State. These vaults cease to be in the flow of interstate commerce, within the Sherman Anti-Trust Act, once they have come to rest in the warehouse of plaintiffs, and are there held for local sale."

The Supreme Court has held that local activities do not constitute interstate commerce within the meaning of the Sherman Act. In United States v. Yellow Cab Co., 332 U.S. 218 (1947) at pages 230-234, it held that local taxicab operations, even though serving passengers arriving from interstate journeys, was not interstate commerce, since the interstate journeys ended when the passengers arrived in that state. The Court stated at pages 231-232:

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement."



The obtaining of shopping center leases with major department stores had no more connection with interstate commerce, or violation of the anti-trust laws, than the shopping center lease involved in the case of Savon Gas Stations No. 6, Inc. v. Shell Oil 203 F. Supp. 529 (D.C.D. Md., 1962), affirmed 309 F.2d 306 (C.A. 962), certiorari denied 373 U.S. 911 (1963). The lease required owners of the shopping center to construct a gasoline service station for Shell and also provided that the lessor would not permit the use of its property for the purpose of a competing gasoline service station. The Court states: (p. 534)

"Restrictive covenants like Article 1A are part of the familiar pattern of shopping center financing, as disclosed by the cases cited in part II hereof, where they are an inducement to attract the prime tenants required by professional lenders. In this case, the restrictive covenant is too limited in geographical scope to be vulnerable to attack under any authority which has been called to my attention.

"Far from substantial, the effect of Article 1A and its enforcement on interstate commerce is incidental and inconsequential; hence, the jurisdictional requirements of the Sherman Act are not met."

Defendant's motion for summary judgment was granted.

Thus the Maryland District Court recognized one of the business facts of life that even restrictive covenants in shopping center leases, let alone leases without such restrictive covenants, are designed to induce "prime tenants required by professional lenders" and do not constitute facts on which a violation of the anti-trust laws can be based.

In summary, the result complained of by Hilltop is the decision by The Halle Bros. Company and The Higbee Company to locate at Severance precludes their location at any or all of the possible sites available at the same time. This decision no more gives rise to a cause of action under the Sherman Act than a decision by a prospective purchaser to buy from manufacturer A, rather than manufacturer B.

The District Court in its Opinion of March 29, 1965, stated:

"Austin is alleged to have conspired with Smith in the general objective of restraining shopping center competition, but no contention is made that Austin conspired in any way specifically with respect to Nutwood.

"The court is of the opinion that these facts do not state a cause of action under the antitrust laws. Assuming arguendo, that there was in fact an anti-trust violation by the defendants, including Austin, plaintiff shows no causal connection between the restraint of shopping center competition and its claimed injury. By plaintiff's own allegations its injury was caused by the fraudulent breach of a fiduciary duty. The fraud itself did not constitute the antitrust violation. To recover, plaintiff must establish two things: (1) A violation of the Antitrust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendants which constitute a violation of the Act." (R. 828)

The District Court then cited Glenn Coal Co. v. Dickison Fuel Co., 72 F.2d 885 (4th Cir. 1934); Schatte v. I.A.T.S.E. 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 827; and finally relied on Peterson v. Borden Co., 50 F.2d 644 (7th Cir.)

sel for cross-appellants takes exception to the applicability  
Peterson v. Borden Co., on the ground that it was an early  
Suffice it to say that early or not, it is still applicable  
in any event, the principle for which it stands was reaffirmed  
his Court in Conference of Studio Unions v. Loew's, 193 F.2d  
54 (9th Cir. 1951, cert. denied, 342 U.S. 919) and by the Court  
ppeals for the Second Circuit in Bookout v. Schine Chain  
tores, 253 F.2d 292 (2nd Cir. 1958) opinion by Judge Learned

4. Even assuming illegal acts, plaintiff was  
not within the "Target Area" as required  
under the Anti-Trust Laws.

The President of plaintiff Hilltop testified that  
ranchise and Nutwood Farm were "not in the same trading area"  
12, supra) and hence were not in competition with each  
r and not in the so-called "target area".

This Court, in recognizing the "target area" concept,  
limited the right to prove damage under the anti-trust laws to  
plaintiffs who have suffered direct injury to established businesses.

Conference of Studio Unions v. Loew's, Inc., 193 F.2d  
9th Cir. 1951, certiorari denied 342 U.S. 919, 1952), supra,  
Court said at page 55:

"He must show that he is within that area of the economy  
which is endangered by a breakdown of competitive condi-  
tions in a particular industry. Otherwise he is not

injured 'by reason' of anything forbidden in the anti-trust laws.

"Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to who have been directly injured by the lessening of competition and withheld from those who seek the windfall of damages because of incidental harm." (Emphasis added)

Even the cases on which Hilltop relies in claiming that recent court pronouncements have enlarged the target area conceived to emphasize the necessity for an existing business affected by the alleged unlawful acts.

See Twentieth Century Fox Film Corporation v. Goldwyn 328 F.2d 190 (9th Cir. 1964) where the plaintiff was an established producer of motion pictures. At page 220:

"Assuming, but not deciding, that this 'target area' concept is relevant in determining whether the plaintiff in a private antitrust suit may claim the benefit of Section 5 of the Clayton Act, plaintiff was within that area under the allegations of his complaint. As one which desired to exhibit motion pictures which it produced, plaintiff was within the area of the economy which was endangered by the alleged combination and monopoly with regard to the exhibition of moving pictures." (Emphasis added.)

In Harman v. Valley National Bank of Arizona, 339 F.2d 100 (9th Cir. 1964) the plaintiff was an established bank and was involved in the loaning of funds, which was the basis of the action. At page 567:

"But in any event, the present complaint alleges that the object of the general conspiracy was the unreasonable



restraint and monopolization of the Arizona money market in which CLIC had acquired a contractual right to funds, the destruction of which affords the basis for appellant's claim." (Emphasis added.)

Hilltop and the Winslow Sisters did not have an establish-  
business, but only the hope that some prospective purchaser might  
e a plan for establishing one.

B. PLAINTIFF'S ALLEGED CAUSE OF ACTION  
ACCRUED MORE THAN FOUR YEARS BEFORE  
THE COMMENCEMENT OF THIS ACTION AND  
IS BARRED BY THE APPLICABLE STATUTE  
OF LIMITATIONS

The only claim against Austin is based upon an alleged viola-  
n of the Sherman Anti-Trust Act. The applicable statute of  
itation is 15 U.S.C.A. § 15(b), a pertinent portion of which reads  
follows:

"Any action to enforce any cause of action under  
§§ 4 or 4(a) shall be forever barred unless com-  
menced within four years after the cause of ac-  
tion accrued. \* \* \*"

The substance of Count No. 4 of the plaintiff's First  
nded Complaint against this defendant is that this defendant  
spired with Larry Smith and Company, and others, for the pur-  
e of preventing the development of regional shopping centers  
the eastern suburbs of Cleveland, Ohio, and more particularly,  
plaintiff's depositions and discovery have been directed  
ard showing that this defendant and the other defendants,  
nspired" to get two department stores, The Halle Bros. Company



and The Higbee Company, to locate a store in the Severance Shopping Center.

As shown in the agreed Statement of Facts, plaintiff knew in the summer of 1959 that The Halle Bros. Company and The Higbee Company planned to put branches in Severance. Plaintiff knew in the summer of 1959 that Larry Smith and Company were, and had been, working as consultants for The Austin Company in the development of Severance. (R. 1166-67, 1191-92). Plaintiff knew in December of 1959 that The Halle Bros. Company and The Higbee Company had executed leases with The Austin Company to enter Severance (R. 1208 ). Prior to the end of 1959, plaintiff knew The May Company had decided to put its major branch store in Cleveland Heights, but not at Severance. Therefore, plaintiff knew that the three major Cleveland department stores had made their plans for large branch stores in the eastern suburbs of Cleveland, a number of miles from Nutwood Farm.

Plaintiff knew by the end of December, 1959, that the development of Severance, with The Halle Bros. Company and The Higbee Company each having branch stores in it, would be a large shopping center, a strong shopping center, and would, in all probability, dominate the primary trading area around Severance.

There is no contention that Austin participated in, contributed to, or even knew of the Smith report until after the

inal Complaint was filed in January of 1963, or that Smith failed to advise Hilltop, fully, of its relationships with in as a potential purchaser of the Severance property. Thus pertinent facts on which Hilltop bases its cause of action for ation of the Sherman Act by Austin were known to it more than years and six months prior to the filing of the First Amended laint on July 24, 1964. The claim against Austin is, there-, barred by the statute of limitations.

VI. ADDITIONAL CONTENTIONS  
OF CROSS-APPELLANT

The plaintiff has belabored its brief with irrelevant ers on which we will only comment briefly. First, the complaint ade that Austin terminated depositions\*. While this is true, District Court froze pretrial discovery, to which order Hilltop's sel took no objection, and held Austin's motion for Protection , but at the same time, permitted Hilltop's counsel to present y factual contention he could think of to make out a cause of on. He did so, and the Court accepted as true "these contentions all reasonable inferences to be drawn therefrom." (Amended randum Opinion, March 29, 1965); (R. 827, 828).

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s shown in Austin's Motion for Protection, counsel for plain-iff had run up 1500 pages of repetitive questioning of Austin ompany principal witnesses and had served notice to take epositions of 44 additional witnesses in Cleveland, New York nd Texas.

Hilltop complains that certain files, originally in the possession of Austin, and turned over to Smith, are "mysterious missing." Great to-do is made of this. With customary imaginary counsel for Hilltop assumes they contain "many important items such as "restrictive terms of earlier drafts of the leases", and that the absence of these papers "is further proof of the conspiracy to violate the anti-trust laws." This is pure fantasy.

Suffice it to say that after 6000 pages of pretrial depositions and microscopic examination of hundreds and hundreds of documents produced by Smith and Austin, plaintiff has only managed to find a few phrases which, when taken out of context and used, charge Austin with conspiring (1) "to marry the competition" by persuading two department stores to execute leases for branches in one shopping center, (2) for the purpose of eliminating "potential competition from other shopping center sites", (3) to prevent a third development from taking place, and (4) so as to dominate the east side of Cleveland.

Discovery of these few phrases in Smith's files is the basis for inflating a complaint about the sale price of a parcel of farm land into an anti-trust case. The transparency is obvious when we look at the phrases. No. 1 sounds like some sort of merger, which somehow might affect competition. No. 2, "eliminating potential competition" has an anti-trust connotation, except that it refers

y to competing parcels of real estate, or "sites" for shop-  
g centers. No. 3 also sounds sinister in that something is  
ng prevented from developing, and No. 4 obviously converts the  
d "dominate" into "creating a monopoly", which is the cardinal  
committed by anti-trust violators.

Hilltop's brief argues that a jury could find damages as  
result of the conspiracy of Austin and Smith. We respectfully  
mit that the District Court gave Hilltop every opportunity to sub-  
written factual contentions on which a cause of action could have  
n made against Austin, that Hilltop did so and the Court accepted  
se contentions as true, and found that Hilltop's contentions  
not present a cause of action under the anti-trust laws"  
ended Memorandum Opinion, March 29, 1965; R. 827, 828).

## VII. CONCLUSION

Hilltop's only claim against any one was for an alleged  
se report by Larry Smith and Company on the economic value of the  
slow Sisters' Nutwood Farm as a possible site for a shopping  
mer. Even Hilltop's President, Petti, so stated when his second  
osition was taken (p. 139):

"Q. So far as Nutwood was concerned, the only thing  
was the false report, isn't that correct?

"A. Well, as we were directly concerned, yes."

To summarize again the conduct of Austin, we find a  
ral, legal, business pattern. Austin acquired land after having



it rezoned for commercial purposes; retained Smith as a consultant to help persuade The Halle Bros. Company and The Higbee Company execute leases for branch stores in a proposed shopping center on the land, thereby enhancing its value, sold the land, with the leases attached, to Smith; later assisted Smith in financing, loaning it money, in return for which Austin took a second mortgage and part of the equity in the shopping center which was to be built thereafter; and, finally, Austin built the shopping center and that is all there is to it.

On the other hand, Hilltop, a broker, hoped to sell Nutwood Farm to some one who might use it for shopping center purposes. It was not rezoned for commercial purposes; no department stores showed any interest in executing leases for branch stores on the farm; Smith was hired to prepare an economic report on Nutwood Farm because Smith had done such an excellent job for Austin. The report was negative; then claimed to be false, because of Smith's conflict of interest; damages were sought against Smith because Hilltop claimed the Nutwood Farm might have been sold for more money if the report had been favorable.

Austin had no knowledge of Hilltop, Nutwood Farm, or Smith's report.

The District Court, in that part of the case which went to trial, found the report was not false and that Hilltop sold the



erty for what it was worth.

The Austin Company should never have been made a party  
this litigation.

We submit the Decision of the District Court in dismissing  
antitrust claim against The Austin Company should be affirmed.

Respectfully submitted,

---

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CERTIFICATE OF COUNSEL

I CERTIFY that, in connection with the preparation of  
brief, I have examined Rules 18, 19 and 39 of the United  
es Court of Appeals for the Ninth Circuit, and that, in my  
ion, the foregoing brief is in full compliance with those  
s.

By

---

Ronald E. McKinstry  
Of Attorneys for  
Cross-Appellee

THE AUSTIN COMPANY



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

NO. 21212

SHARON DE LANGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court  
For the Southern District of California  
Southern Division

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APPELLANT'S OPENING BRIEF

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**FILED**

**AUG 26 1966**

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**NOV 4 1966**



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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NO. 21212

SHARON DE LANGE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S OPENING BRIEF

---

STATEMENT OF JURISDICTION

The Appellant, Sharon De Lange, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346 (b) for negligent examination by appellee's doctors. The matter was tried in the United States District Court for the Southern District of California, Southern Division, before the Honorable Fred Kunzel, United States District Judge. On June 14, 1966, judgment was entered in favor of defendant United States of America, the Court holding that appellant's action was one based upon misrepresentation and accordingly exempted by 28 U.S.C. 2680 (h).

Appeal from this ruling is taken pursuant to 28 U.S.C. 1291. Appellant

of this Court.

### SPECIFICATION OF ERROR

The District Court erred in the following respect:

1) In deciding that the exemption set forth in Subsection (h) of Section 2680, Title 28 U.S.C. applies to this case so as to preclude this action from being brought under the Federal Tort Claims Act.

### STATEMENT OF THE CASE

#### A. QUESTION INVOLVED.

The single question of law presented to the Court is whether Congress intended to exempt the United States from liability for a negligent diagnosis which was communicated, when it used the term "misrepresentation" in 28 U.S.C. Section 2680 (h).

#### B. STATEMENT OF FACTS.

Appellant, a 37-year-old Naval dependent, was, in 1964, employed as a waitress at the Chief Petty Officers' Club, United States Naval Training Center, San Diego, California. She had been employed as such for approximately 13 months prior to the incident in question.

On July 8, 1964, appellant, in her capacity as an employee, was required to take a routine physical examination consisting of a chest x-ray and blood test. The tests were given at the Naval dispensary, WAVE'S Sick Barracks, at the Training Center. After the examination, appellant was notified, over the telephone that the blood test had to be repeated. She reported for a second blood test on

July 15. This test and the previous one were recorded as being "brusky negative"

"doubtful positive". On July 20th, appellant received a telephone call from someone who identified himself as a Chief at the Naval Dispensary. The Chief told appellant not to report to work because she had syphilis. Appellant then asked to talk to the doctor in charge and a Dr. Emanuel talked with her and advised her to go to a private physician because she had syphilis. Appellant, upon being informed she had syphilis, became extremely upset and hysterical.

On July 20, immediately after being told she had syphilis, on her own volition, appellant took three separate blood tests; one at the Public Health Center, one at the United States Naval Hospital and another from a private physician. The results of these tests were negative and that the previous tests at the Training Center were in error.

On July 21, appellant went to the Naval Training Center and there saw Dr. Clarence P. Judge, who requested she go to the Naval Hospital and see a Dr. Brothers in dermatology, which she did on the same day.

Dr. Judge testified that appellant appeared very upset and on the slip which was sent with appellant to the Naval Hospital he noted "she has been unduly frightened by the possibility of lues". Dr. Judge explained that the word "lues" is used in place of syphilis. The further examination and blood test at the Naval Hospital was negative.

Dr. Judge further testified that the blood test given at the Naval Training Center is known as a broad spectrum test and is not refined enough to rule out such other diseases besides syphilis as malaria, measles and mononucleosis, where there is a positive reaction. He further stated that when the test indicates a positive

the exact cause of the reaction and that the facilities for giving the further tests are not available at the Naval Training Center.

Appellant's immediate hysterical condition and her subsequent physical suffering were directly caused by her having been told she had syphilis

(It should be made clear that the above Statement of Facts is largely taken from the memorandum of Judge Fred Kunzel and any conclusions stated above are conclusions of the Court itself and are Findings of Fact of the said Court.)

### SUMMARY OF ARGUMENT

Title 28 U.S.C. Section 2680 (h) excludes "Any claim arising out of . . . misrepresentation, deceit, . . . (Emphasis added)".

The government contends that the statement to appellant, to the effect that she had syphilis, was a misrepresentation and as such comes within the exception contained in 2680(h).

The appellant asserts that the Supreme Court in the case of USA v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L ed.2d 614, 1961, included in its decision a comment, by way of footnote, suggesting that the misrepresentation and deceit exclusion may be confined to conduct involving business transactions. Appellant, therefore, argues that the case at bar does not, in the words of the Supreme Court "arise out of . . . misrepresentation" any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. That therefore, the case at bar does not come within the misrepresentation of Title 28 U.S.C. Section 2680(h).



- 1) From the negligent and wrong conclusion drawn by government personnel from the routine blood test; based upon inadequate information;
- 2) From improper reliance of government personnel on the conclusion reached by the blood test;
- 3) From Dr. Emanuel's negligence in failing to give a complete physical examination prior to any notification to appellant;
- 4) Finally, the negligent communication to appellant serves as only one additional negligent act.

### ARGUMENT

#### A. THE CASE AT BAR DOES NOT ARISE OUT OF MISREPRESENTATION AND THEREFORE DOES NOT COME WITHIN THE MISREPRESENTATION SECTION OF TITLE 28 U. S. C. SECTION 2680(h)

The cornerstone of appellant's position in the final footnote to the Supreme Court decision of United States v Neustadt (supra).

"Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co v. United States, 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a light-house. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent

in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' Prosser, Torts, §85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed). See also 2 Harper and James, Torts, §29.13, at 1655 (1956)."

It must be noted first that the Court clearly distinguishes one actual decision and a large group of fact situations from the business situation in Neustadt. The Court clearly states that the damages caused by the negligent failure to maintain a beacon lamp in a lighthouse does not "arise out of . . . misrepresentation". They further distinguish the negligence of a motor vehicle operator in giving a misleading turn signal. The damages in both of these fact situations, like the case at bar, are ultimately precipitated by a misrepresentation if we use that word in its generic sense; however, these situations, like the case at bar, clearly arise out of negligent conduct in all of its legal aspects.

In the case of Indian Towing Company v. U.S., 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955), the negligent conduct was the failure to properly maintain a beacon lamp. It was this conduct that ultimately brought about the damage to the vessel that ran aground.

In essence, the absence of the beacon light as a warning to plaintiff constituted a misrepresentation by the Coast Guard to plaintiff, since it implied that

to have their vessel run aground. The Supreme Court held that plaintiff was entitled to recover under the Federal Tort Claims Act on the basis of defendant's negligence. At no time did the Court consider that plaintiff's cause of action was in any way subject to the exclusionary provisions of 2680(h).

The Neustadt case confirms this position by directly saying that although the damages in such a case, as Indian Towing, were in the final analysis caused by a misrepresentation, the damage actually arose out of the negligent conduct of the Coast Guard in failing to properly maintain the beacon lamp.

In the case at bar, the damages were ultimately caused by the communicated misdiagnosis, however, they arose out of the failure of the United States to properly diagnose the appellant's condition.

As stated in Prosser on Tort, Section 100 "Remedies for Misrepresentation" at page 697, "a great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of personal property, are in their essence nothing more than misrepresentation. From a misleading signal by the driver of an automobile about to make a turn, or the assurance that a danger does not exist, to false statements concerning a chattel sold, or non-disclosure of a latent defect by one who is under a duty to give warning. . . . in all such cases the particular form which the defendant's conduct has taken has become relatively unimportant and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the Courts nor legal writers have found any occasion to regard it as a separate basis of liability". However, as we see before us, the Federal Courts have found it necessary to make such a distinction as a distinc-

B. THE BASIC DISTINCTION TO BE DRAWN IS BETWEEN THE BUSINESS TYPE CASE AND THE TYPE OF MATTER WHERE THE NEGLIGENT USE OF LANGUAGE GIVES RIGHTS TO PHYSICAL INJURY TO PERSON OR PROPERTY.

The decisions in this area fall into three basic categories:

- 1) The pure business type case where the use of language causes no direct personal injury to health and well being or property damage;
- 2) Misrepresentation resulting in personal injury or property damage where such injuries come as a result of negligently prepared weather reports and hurricane and flood warnings gratuitously disseminated;
- 3) Misrepresentation resulting in personal injury to health or well being on property damage directly caused by words spoken directly to the other party.

The rationale in question was adopted in the Neustadt case (A claim by a purchaser of a home who, in reliance upon a negligenc inspection and approval by an FHA appraiser, had been induced to pay more for the property than it was worth. ). The Neustadt case included comment by way of footnote that the misrepresentation and deceit exclusion may be confined "very largely" to conduct involving business transaction citing both Prosser and Harper and James on Torts.

However, Neustadt failed to refer to the troublesome misrepresentation cases based upon negligently prepared weather reports and hurricane and flood warnings gratuitously disseminated by the Federal Government. In this area it should be noted that the law of negligence treats the use of language quite differently from other types of conduct. The area within which the negligent use of words may give rise to a cause of action at common law is limited; negligent

words are not actionable unless uttered directly with knowledge or notice that



they will be acted upon, to one who the speaker is bound by some relation or duty, arising out of public calling, contact or otherwise. Ultramares Corporation v. Touche, 255 NY 170, 185, 174 NE 441 (1931).

This, therefore, lists three basic requirements for creating liability in such cases:

- 1) Words must be spoken directly to the other party;
- 2) The speaker must know that they will be relied upon;
- 3) There must be a relation giving rise to the duty to speak with care.

This analysis would prevent recovery against the government for misinformation or misstatements made by the United States in connection with its gratuitous information disseminating services, listed above, wholly apart from the exclusionary provisions of 2680(h).

Further, it is absolutely clear that, under the above analysis and under the common law, the appellant would be entitled to recovery as a result of the conduct of the United States in the case at bar.

Dr. Emanuel spoke directly to the appellant; the appellant relied upon him as an agent of the United States; and the doctor was under a duty arising out of his public calling as a medical practitioner to speak with care.

If you distinguish the weather, hurricane and flood warnings cases as above, all that stands as an impediment to recover in the case at bar is the decision of this Court in Hungerford v. United States, 307 Fed.2d 99 (Ninth Circuit Cal. 1962). It is based upon this decision that the Court below held:

"Despite my doubt as to Congressional intent, I feel bound by the



hold that this action is one based upon misrepresentation and accordingly exempted by Section 2680(h)."

### C. ANALYSIS OF THE HUNGERFORD DECISION.

In Hungerford v. U.S., the claim was for medical malpractice as in the case at bar. It was alleged that the claimant, a veteran, entered the V.A. Hospital for unaccountable blackouts, falls and severe head pains. That due to the negligent manner in which he was examined and which diagnostic tests were performed, and due to the negligent failure to make necessary diagnostic tests, it was not discovered that the plaintiff had organic brain damage of traumatic origin which could be corrected by surgery. Instead, his condition was negligently diagnosed as psychosomatic and he was so advised. He was released without the necessary surgical treatment. In ruling that the subsequent Tort Claims Act suit was not excluded by 2680(h) this Court seemed to acknowledge the incorrect diagnosis communicated to the claimant was a misrepresentation, but held that where the government is chargeable with a dual duty in ascertaining the patient's condition, i.e., a duty to advise him what his condition is, and the duty to render proper care and treatment for that condition; breach of the latter duty is accountable even though breach of the former duty is not.

In the case at bar it is absolutely clear under the decision and findings of the trial court that appellant's damages occur as a direct result of the misrepresentation of an agent of the United States; therefore, Judge Kunzel felt bound by the Court's apparent finding that in such a matter Section 2680(h) would preclude

position of asking this Court to reverse the position previously taken in the Hungerford case.

As discussed above, the Supreme Court's decision of Neustadt, though admittedly dictum, indicates that such a matter as the case at bar would require that the United States be held responsible.

Finally, it must be pointed out to the Court that the appellant has instituted an action against Dr. Emanuel individually in the State Court and this action has been served upon that doctor. As of the date of the writing of Appellant's Opening Brief, Dr. Emanuel has not filed his answer to the complaint.

Appellant's action points up a question of pure public policy that must be demonstrated to this Court as part and parcel of an analysis of this type of fact situation.

To relieve the United States of responsibility in the case of a communicated diagnosis places solely upon the individual physician the responsibility and burden of its correctness and ultimately, if he proves to be incorrect, the added burden of personally defending his position in a Court of law and, if his error proves to be a negligent one, the horrendous burden of paying in money for his error. This, in its turn, promotes the practice of bad medicine in that the physician employed by the United States would be reluctant to communicate any diagnosis in the fear of taking a personal responsibility for any possible error.

It is also obvious that the government doctor will be required to contract for medical malpractice insurance to protect his personal savings from liability.

CONCLUSION

The facts of the case at bar cry out for reversal of the position taken by this court in the Hungerford case. The appellant's damage does not "arise out of misrepresentation". It arises from:

- 1) The negligent and wrong conclusion drawn by government personnel from the routine blood test based upon inadequate information;
- 2) From improper reliance of government personnel on the conclusion reached by the blood test;
- 3) From Dr. Emanuel's negligence in failing to give a complete physical examination prior to any notification to appellant;
- 4) Finally, the negligent communication to appellant serves as only one additional negligent act.

All of the acts listed above play a substantial role in bringing about the damages herein sustained. Can the United States rid itself of responsibility for all the above negligent conduct by communicating it to the appellant within an exception to Title 28 U.S.C. Section 2680(h)?

Respectfully submitted,

BEAR, GELFAND, GREER & BAUER

By: /s/ MICHAEL I. GREER

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ MICHAEL I. GREER





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SHARON L. DE LANGE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE APPELLEE

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FILED

NOV 23 1966

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 21,212

SHARON L. DE LANGE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE APPELLEE

---

JURISDICTIONAL STATEMENT

The appellant instituted this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., for damages for injuries allegedly resulting from a government physician's telling her that she had a certain communicable disease (Tr. I. 2-4). <sup>1/</sup>

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<sup>1/</sup> "Tr. I." references are to Volume I of the Transcript of Record, containing pleadings, motions, the district court's opinion, etc. "Tr. II." references are to Volume II of the Transcript of Record, containing the testimony in the court below.

The district court held that appellant's claim was excepted from the Tort Claims Act by the provision in 28 U.S.C. 2680(h) that the Act shall not apply to "any claim arising out of \* \* \* misrepresentation \* \* \* " (Tr. I. 76-81). Judgment was rendered for the Government on June 14, 1966, and the plaintiff filed her notice of appeal on July 11, 1966 (Tr. I. 82). This Court's jurisdiction is invoked under 28 U.S.C. 1291.

### STATEMENT OF FACTS

The plaintiff-appellant was in July 1964 employed as a waitress at the Chief Petty Officers Open Mess at the United States Naval Training Center, San Diego, California (Tr. I. 3, 76). She had been so employed for thirteen months prior to July 1964 (Tr. I. 76). The Navy requires that all of its employees assigned to Naval Training Center Messes be given routine annual physical examinations after their employment commences in order to qualify for continued employment (Tr. I. 67-69, 72). The purpose of these examinations is to protect people served at such messes (Tr. I. 72). On July 8, 1964, appellant reported to the dispensary at the Naval Training Center for her annual physical examination, and as part of that examination she was given a VDRL test (Venereal Disease Research Laboratory test) (Tr. I. 64, 73). The results of the VDRL test on that date were "doubtful positive, weakly reactive," and appellant was told to return about a week later for another blood test (Tr. I. 73, 76). The results of the second

VDRL test done on July 15, 1964, were again "doubtful positive, weakly reactive" (Tr. I. 73, 76).

Appellant testified that on July 20, 1964, she received a call from a Chief at the dispensary who told her not to report to work because she had syphilis (Tr. I. 76). She further testified that she requested to speak with the doctor in charge, and that she then talked to a Dr. Emanuel who told her that she had syphilis and advised her to go to a private physician (Tr. I. 77).

As the district court found, upon being told that she had syphilis, the appellant became upset and hysterical (Tr. I. 77). She then took three separate blood tests, one at the Public Health Center, another at the United States Naval Hospital, and another from a private physician, and the results of these tests were negative (Tr. I. 77). These latter three tests, plus a subsequent test, established that the appellant did not have syphilis and that the representation by Dr. Emanuel was erroneous (Tr. I. 77). As revealed by the testimony and the district court's findings, the blood test which was given at the dispensary on July 8, 1964, and repeated on July 15, 1964, is a broad spectrum test, and a positive reaction does not rule out other diseases besides syphilis, such as malaria, measles and mononucleosis (Tr. I. 77). When the VDRL test indicates a positive reaction, more refined tests must be given to determine the exact cause of the reaction (Tr. I. 77).

As a result of being told that she had syphilis, the appellant allegedly "has suffered permanent injury to her personality and character, great mental pain, suffering and anguish, embarrassment and loss of earnings" (Tr. I. 3). It was alleged that



she has incurred medical expenses and will continue to incur them (Tr. I. 3). The appellant's physician testified that being told that she had syphilis aggravated a pre-existing mental condition (Tr. II. 120), which has resulted in appellant being disabled from returning to work (Tr. II. 112).

After the trial, the district court rendered an opinion containing findings of fact and conclusions (Tr. I. 76-81). Specifically, the court found that the appellant's damage flowed from the original communication to her on July 20th that she had syphilis and that a claim arising out of such a communication is excepted from the Tort Claims Act's coverage, in light of 28 U.S.C. 2680 as construed by this Court in Hungerford v. United States, 307 F. 2d 99, 102-103 (C.A. 9).

#### STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., provides in pertinent part:

##### § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to --

\* \* \*

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.



The Federal Employees' Compensation Act, 5 U.S.C. (September 1966 revision) 8116(c) provides:

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 U.S.C. (September 1966 revision) 8171-8173 provides in pertinent part:

§ 8171. Compensation for work injuries; generally.

(a) Chapter 18 of title 33 applies with respect to disability or death resulting from injury, as defined by section 902(2) of title 33, occurring to an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is —

(1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or

(2) employed inside the continental United States.

However, that part of section 903(a) of title 33 which follows the first comma does not apply to such an employee.

\* \* \*

§ 8173. Liability under this subchapter exclusive.

The liability of the United States or of a non-appropriated fund instrumentality described by section 2105(c) of this title, with respect to the disability or death resulting from injury, as defined by section 902(2) of title 33, of an employee referred to by sections 8171 and 8172 of this title, shall be determined as provided by this subchapter. This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the disability or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

ARGUMENT

The waiver of sovereign immunity for tort claims in the Federal Tort Claims Act does not extend to appellant's action upon two separate grounds. First, as shown in Point I below, the district court correctly held that appellant's claim was barred by the statutory exclusion for claims arising out of misrepresentation. This holding was compelled by this Court's opinion in Hungerford v. United States, 307 F. 2d 99, 102-103 (C.A. 9). Second, as we go on to demonstrate under Point II, appellant's injury arose out of and in the course of her employment as a governmental employee, and, consequently, her exclusive remedy against the Government was to file a claim for workmen's compensation benefits. United States v. Forfari, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 901.

I. APPELLANT'S CLAIM IS BARRED BY THE  
MISREPRESENTATION EXCEPTION TO THE  
FEDERAL TORT CLAIMS ACT.

In her brief, the appellant frankly acknowledges that "In the case at bar it is absolutely clear under the decision and findings of the trial court that appellant's damages occur as a direct result of the misrepresentation of an agent of the United States \* \* \* (Appellant's brief, p. 10). However, the Federal Tort Claims Act in 28 U.S.C. 2680(h) excludes from its coverage "any claim arising out of \* \* \* misrepresentation \* \* \* ." This exception "comprehends claims arising out of negligent, as well as willful misrepresentation." United States v. Neustadt, 366 U.S. 696, 702. As appellant's claim admittedly arises out of an alleged negligent "misrepresentation" by a government employee, the misrepresentation exception to the Tort Claims Act furnishes a dispositive ground requiring affirmance of the district court's decision.

Directly in point is this Court's decision in Hungerford v. United States, 307 F. 2d 99, 102 (C.A. 9), where the Court stated:

A communicated diagnosis as to physical condition is a representation. See Hall v. United States, 10 Cir., 274 F. 2d 69. An incorrect representation is a "misrepresentation" within the meaning of the statute, whether wilful or based upon negligence is ascertaining the facts represented. United States v. Neustadt, 366 U.S. 696, 702, 81 S.Ct. 1294, 6 L. Ed. 2d 614.

In Hungerford, also a medical malpractice case, this Court went on to draw a distinction between the type of medical malpractice covered by the misrepresentation exception and the type falling



outside of the exception. Thus, where the alleged negligence of the government physician causing the plaintiff's injury is in the diagnosis of the plaintiff's condition and the communication to the plaintiff, unaccompanied by a negligent failure to render treatment, the misrepresentation exception is applicable. On the other hand, as the Court further held in Hungerford, where the government physician also has a duty to render treatment for the plaintiff's condition, the breach of this additional duty is not excepted from the Tort Claims Act, despite the fact that a negligent diagnosis communicated to the plaintiff may have been an element in the failure to render proper treatment.

In light of the distinction drawn in Hungerford, it is clear that the instant case is excepted from the coverage of the Tort Claims Act. The appellant reported to the dispensary at the Naval Training Center merely for a routine annual physical examination required by her employment, not for any treatment (Tr. I. 2-3, 64, 69, 72; Tr. II. 8, 51, 54, 56). The sole purpose of the examination was to determine whether the appellant had any communicable disease which would bar her employment at the mess, in order to protect the people served at the mess (Tr. I. 64, 67-69, 72; Tr. II. 56, 71-72). <sup>2/</sup> Appellant would not have been able to obtain treatment at the dispensary, but would have had to obtain

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<sup>2/</sup> Thus, the appellant stipulated in the district court that "All persons employed in handling food at the Naval Training Center Messes are given yearly routine physicals for the purpose of protecting people served at such Messes" (Tr. I. 72).

treatment at the United States Naval Hospital, San Diego, California (Tr. I. 66; Tr. II. 71). Furthermore, as the appellant stated in the court below and as the court found, she was not injured by lack of treatment but her injury flowed from the communication to her (Tr. I. 41, 81). Consequently, appellant's claim does not arise out of a negligent failure to render treatment, which might be actionable. Instead, her claim arises solely out of an incorrect communicated diagnosis as to her physical condition, which, as held by this Court in Hungerford, is a misrepresentation within the meaning of the Tort Claims Act's exception.

The appellant, acknowledging that the district court's decision was compelled by Hungerford v. United States, asks this Court to overrule the position taken in Hungerford (Appellant's brief, pp. 10-12). However, as this Court has stated, "This Court should respect and follow our previous opinions. The trial courts are entitled to rely upon such earlier pronouncements." California State Board of Equalization v. Goggin, 245 F. 2d 44, 45 (C.A. 9) certiorari denied, 353 U.S. 961. See also, Etcheverry v. United States, 320 F. 2d 873, 874 (C.A. 9), certiorari denied, 375 U.S. 930. The weight that should be accorded prior decisions is illustrated by this Court's rule that "a decision of this Court can be overruled only in en banc proceedings," Ellis v. Carter, 291 F. 2d 270, 273, fn. 3 (C.A. 9). In addition, on questions of statutory construction, a court is even more reluctant than usual to reconsider its prior interpretation of a statute, as "Congress can rectify our mistake, if such it was, or change its policy at any



time, and in these circumstances reversal is not readily to be made.'" Patterson v. United States, 359 U.S. 495, 496.

Furthermore, appellant has failed to demonstrate that the distinction drawn in Hungerford v. United States is erroneous. Appellant's principal reliance for her position that the Tort Claims Act's misrepresentation exception is not applicable to medical malpractice cases, is a footnote in United States v. Neustadt supra, 366 U.S. at 711, fn. 26, where the Court quoted Dean Prosser's statement that the separate tort of negligent misrepresentation has been confined "very largely to the invasion of interest of a financial or commercial character, in the course of business dealings." However, the Supreme Court did not hold that the misrepresentation exception to the Tort Claims Act was exclusively confined to such situations. On the contrary, the Court's use of the word "largely", and its citation with approval of cases applying the exception to other situations than an invasion of financial or commercial interests in the course of business dealings (366 U.S. at 702-703), demonstrates that the Supreme Court was not holding that the exception applies exclusively to this category of cases. Thus, the Supreme Court cited with approval this Court's decision in Clark v. United States, 218 F. 2d 446, 452 (C.A. 9) and the Eighth Circuit's decision in National Mfg. Co. v. United States, 210 F. 2d 263, 275-276 (C.A. 8), which did not involve an invasion of commercial or financial interests but involved direct physical injury to persons and property as a result of weather conditions inadequately reported, and in which both courts held that

the Tort Claims Act's misrepresentation exception was a bar to recovery. In addition, the Court in United States v. Neustadt, supra, 366 U.S. at 703-704, cited with approval and quoted from the Tenth Circuit's decision in Hall v. United States, 274 F. 2d 69 (C.A. 10), which, although involving an invasion of the plaintiff's financial interests, did not involve a "course of business dealings" between the plaintiff and the Government. <sup>3/</sup>

Furthermore, the consistent holdings of the federal courts disclose beyond any doubt that the misrepresentation exception to the Tort Claims Act embraces other situations than an invasion of financial or commercial interests in the course of business dealings. In addition to Hungerford v. United States, supra; Clark v. United States, supra; National Mfg. Co. v. United States, supra; and Hall v. United States, supra; which we have discussed above, see also, Beech v. United States, 345 F. 2d 872, 874 (C.A. 5) (agreeing with the distinction drawn in Hungerford); Tapia v. United States, 338 F. 2d 416 (C.A. 2) (holding that the Government's obtaining of a criminal conviction by means, inter alia, of "false representations, is not actionable because of 28 U.S.C. 2680(h)); Steinmasel v. United States, 202 F. Supp. 335, 338 (D. S.D.) (holding that misrepresentations causing the plaintiff to lose veteran's benefits are covered

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<sup>3/</sup> It is also significant that the Neustadt opinion was rendered prior to this Court's decision in Hungerford and was cited in Hungerford. Consequently, this Court apparently did not view the Supreme Court's opinion as holding that 28 U.S.C. 2680(h) was limited to situations involving an invasion of financial or commercial interests in the course of business dealings.

by the misrepresentation exception); Bartie v. United States, 21 F. Supp. 10, 20-21 (W.D. La.), affirmed, 326 F. 2d 754 (C.A. 5), certiorari denied, 379 U.S. 852 (involving misrepresentations concerning weather conditions). <sup>4/</sup>

It is probably true, as the Supreme Court's opinion in United States v. Neustadt indicates, that the misrepresentation exception to the Tort Claims Act will most often be applicable in cases involving an invasion of financial or commercial interests in the course of business dealings. <sup>5/</sup> However, as we have shown, the

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<sup>4/</sup> In her effort to show that the statutory exclusion for claims arising out of misrepresentation is confined to conduct "involving business transactions," appellant attempts to distinguish the weather report cases on the ground that, in such situations, no duty is owed by the Government to the plaintiffs (Appellant's brief, 8-9). Of course, if the courts in those cases had held that no duty was owed, there would have been no causes of action as a matter of tort law, and the question of the misrepresentation exception would not have been reached.

Actually, in all three weather report cases previously referred to (Clark v. United States; National Mfg. Co. v. United States; and Bartie v. United States), the Government had argued as an alternate ground that no duty was owed to plaintiffs. Except for the concurring opinion in National Mfg. Co., the courts did not reach this question, but based their decisions on the Tort Claims Act's misrepresentation exception, as well as other exclusions to the Act. For example, in Clark, this Court "assumed" and guendo that "the United States owed a duty to appellants" (218 F. 2d at 451) and flatly held that the misrepresentation exception barred the claim (268 F. 2d at 452).

Consequently, there is no merit to appellant's attempted distinction of the weather report cases. Appellant has not even attempted to distinguish the other cases cited above applying the misrepresentation exception to situations not involving business transactions.

<sup>5/</sup> E.g., United States v. Neustadt, supra; Jones v. United States, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; Miller Harness Co. v. United States, 241 F. 2d 781, 783 (C.A. 2); Anglo-American & Overseas Corp. v. United States, 242 F. 2d 236 (C.A. 2).



exception has not been exclusively limited to such situations. An examination of the cases reveals that where the specific activity of the government being complained of primarily involves the making of verbal or written statements, along with the preliminary steps necessary thereto, and where the plaintiff's injury is directly caused by erroneous oral or written communications or the failure to so communicate, the misrepresentation exception in 28 U.S.C. 2680(h) prohibits the imposition of liability upon the Government. As the Court of Appeals stated in National Mfg. Co. v. United States supra, 210 F. 2d at 276: "The intent of the section is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States." On the other hand, where the making of a representation is merely an incidental element in the particular activity being complained of and which causes the injury, the courts have held that the exception is not applicable.<sup>6/</sup> Furthermore, where the "misrepresentation" does not consist of oral or written statements, but consists of conduct not normally thought of as a communication, the exception

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5/ See, Hungerford v. United States, supra; and Beech v. United States, supra. See also, United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 398 (C.A. 9), certiorari dismissed, 379 U.S. 951.

has not been applied. 7/

This Court's decision in Hungerford v. United States, supra is entirely consistent with the course of decisions dealing with the Tort Claims Act's misrepresentation exception. Furthermore, as previously pointed out, the distinction drawn in Hungerford has been followed by the Fifth Circuit in Beech v. United States, supra 345 F. 2d at 874. Appellant has completely failed to demonstrate that the Hungerford decision should be overruled. And, as appellant admits, if the position taken by the Court in Hungerford is

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7/ For example, where there has been a failure by the Government to properly warn of impending danger under circumstances where the warning would be expected to take the form of oral or written statements being disseminated, as in the weather report cases, the misrepresentation exception has been applied. However, where the failure to properly warn involves other form of conduct, such as permitting a beacon lamp in a lighthouse to go out, the exception has not been applied. Compare Clark v. United States, supra; and National Mfg. Co. v. United States, supra; with Indian Towing Co. v. United States, 350 U.S. 61.



3/ Finally, even if appellant were correct in her contention that Hungerford should be overruled, and that the Tort Claims Act's exclusion for claims arising out of misrepresentation is limited to situations involving an invasion of financial or commercial interests, in the course of business dealings, it is by no means clear that appellant's claim would still not be barred by the misrepresentation exception. The appellant was rendering a service to the Government for a salary; the Government's examination of the appellant was to determine whether appellant would be permitted to continue rendering that service; the representation concerning appellant's condition was entirely in connection with this employer-employee relationship; the immediate consequence of the representation was that appellant would no longer be allowed to continue as a governmental employee; and one of the items of damage flowing from the misrepresentation is that appellant is disabled from working for anyone (Tr. I. 48). Such a claim might very well be viewed as involving an invasion of interests of a financial or commercial character, in the course of business dealings.

If, instead of rendering a service, appellant was selling a product to the Government, if the Government had examined that product to determine whether it would continue buying it, if the Government had incorrectly represented the nature of the product so that appellant could no longer continue selling it to the Government, and if the incorrect representation injured appellant with respect to selling the product to others, appellant's claim would clearly be viewed as involving an invasion of financial or commercial interests in the course of business dealings, and barred by 28 U.S.C. 2680(h). The only difference between the present case and the hypothetical, is that the business dealings and representations involve services rendered by an individual instead of a product.

II. AS APPELLANT'S INJURY AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT AS A GOVERNMENT EMPLOYEE, THERE IS NO JURISDICTION UNDER THE FEDERAL TORT CLAIMS ACT TO ENTER-TAIN HER SUIT, BUT HER EXCLUSIVE REMEDY AGAINST THE GOVERNMENT IS A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS.

As we have demonstrated, appellant's claim is excepted from the coverage of the Federal Tort Claims Act by the exclusion in 28 U.S.C. 2680(h) for claims arising out of misrepresentation. However, there is another equally dispositive ground requiring affirmance of the district court's decision in this case. Since appellant's injury arose out of and in the course of her employment as a governmental employee, her exclusive remedy against the Government is to file an administrative claim for workmen's compensation benefits. As Congress has expressly provided, 5 U.S.C. (September 1966 revision) 8116(c), 8173, the United States may not be held liable under the Federal Tort Claims Act for such a work-related injury to a governmental employee.<sup>9/</sup>

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9/ This particular ground for dismissal of the appellant's action was not raised by the Government in the district court. However, "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." Jaffke v. Dunham, 352 U.S. 280, 281. See also, Helvering v. Gowran, 302 U.S. 238, 245.

Furthermore, a statutory limitation upon suits against the United States raises a jurisdictional question which may not be waived. See, e.g., Finn v. United States, 123 U.S. 227, 233; United States v. Michel, 282 U.S. 656; Munro v. United States, 303 U.S. 36, 41; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506; Rodiniuc v. United States, 175 F. 2d 479, 481 (C.A. 3), certiorari denied, 338 U.S. 895; Albe v. Brownell, 219 F. 2d 602, 604-605 (C.A. 9); United States v. Finn, 239 F. 2d 679, 683 (C.A. 9). "Not even a U.S. District Attorney may waive conditions or limitations imposed by statute in respect of suits against the United States." Anderegg v. United States, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967.



Congress has provided two comprehensive compensation schemes for federal government employees who sustain personal injuries related to their government employment. The Federal Employees' Compensation Act, 5 U.S.C. (1966 revision) 8101-8150, provides compensation for regular government employees and certain others rendering services to the United States (§ 8101) who sustain injuries "while in the performance of [their] dut[ies] \* \* \* " (§ 8102).<sup>10/</sup> With respect to employees of so-called "Nonappropriated Fund Instrumentalities," Congress has in 5 U.S.C. (1966 revision) 8171-8173 provided that they should receive compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, for injuries "arising out of and in the course of employment" (33 U.S.C. 902(2)).<sup>11/</sup>

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<sup>10/</sup> The Employees Compensation Appeals Board of the Department of Labor, the agency which renders final decisions under the Federal Employees' Compensation Act, has held that the phrase "while in the performance of his duty" contained in the Federal Employees' Compensation Act is synonymous with the phrase "arising out of and in the course of employment" contained in most other workmen's compensation laws. See, e.g., In the Matter of Harold Vandiver, 4 E.C.A.B. 195, 196 (1951); In the Matter of Lillie J. Wiley, 6 E.C.A.B. 500, 502 (1954); In the Matter of Robert A. Hoban, 6 E.C.A.B. 773 (1954).

<sup>11/</sup> Prior to 1952, employees of nonappropriated fund instrumentalities were covered by the Federal Employees' Compensation Act. In that year, Congress exempted such employees from the provisions of the Federal Employees' Compensation Act, and provided that the nonappropriated fund instrumentalities should procure workmen's compensation insurance in accordance with state law (66 Stat. 138). In 1958, Congress enacted the present provisions, making the Longshoremen's and Harbor Workers' Compensation Act applicable to such employees (72 Stat. 397). This Court's opinion in United States v. Forfari, 268 F. 2d 29, 32-33, certiorari denied, 361 U.S. 902, discusses this history and the various statutory changes.

It is well-established that where an injury to a federal employee is embraced by either Compensation Act, no action based upon that injury may be maintained under the Federal Tort Claims Act or under any other federal tort liability statute. The Compensation Act remedy is exclusive. See, e.g., Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S. 495; United States v. Firth, 207 F. 2d 665 (C.A. 9); Underwood v. United States, 207 F. 2d 862 (C.A. 10); Balancio v. United States, 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; Somma v. United States, 283 F. 2d 149 (C.A. 3); all involving injuries encompassed by the Federal Employees' Compensation Act. See also, United States v. Forfari, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; Lowe v. United States, 292 F. 2d 501 (C.A. 5), affirming 185 F. Supp. 189 (N.D. Miss.); Rizzuto v. United States, 298 F. 2d 748 (C.A. 10); all involving employees of nonappropriated fund instrumentalities.

Indeed, this exclusivity has been codified by Congress with respect to both compensation schemes. Thus, 5 U.S.C. (1966 revision) 8116(c), supra, p. 5 , provides that the liability of the United States or an instrumentality thereof under the Federal Employees' Compensation Act "is exclusive and instead of all other liability of the United States \* \* \* because of the injury \* \* \* in a direct judicial proceeding, in a civil action, \* \* \* or under a Federal tort liability statute." Similarly, 5 U.S.C. (1966 revision) 8173, supra, p. 6 , provides that the liability of the United States or of a nonappropriated fund instrumentality to pay compensation under the

Longshoremen's and Harbor Workers' Act shall be "exclusive and instead of all other liability of the United States or the instrumentality to the employee \* \* \* under a Federal Tort liability statute." Therefore, Congress has specifically exempted from the coverage of the Tort Claims Act a claim based upon a work-related injury to a regular governmental employee or an employee of a nonappropriated fund instrumentality.<sup>12/</sup>

The appellant's injury is clearly covered by one or the other of the federal employees' workmen's compensation systems. As previously pointed out, the examination and diagnosis of appellant was solely for employment purposes (Tr. I. 72; Tr. II. 8, 32-33, 38, 51, 56, 72-73). It was for the benefit of the Government and the persons being served by the Government at the mess, not for appellant's benefit (Tr. I. 72). The examination and diagnosis was required by the regulations of appellant's employer, the Navy (Tr. I. 64-65, 67-69). It is well-settled that an injury resulting from a medical examination under such circumstances is compensable as a matter of workmen's compensation law. Cf., Neudeck v. Ford Motor Co., 249 Mich. 690, 229 N.W. 438; Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421,

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<sup>12/</sup> The record in this case does not disclose whether or not the Chief Petty Officers' Mess where appellant was employed was a nonappropriated fund instrumentality, although we believe that it was. See, United States v. Forfari, *supra*, 268 F. 2d at 30-31; Lowe v. United States, *supra*, 185 F. Supp. at 190. However, for purposes of this case, it makes no difference whether the appellant's remedy is under the Federal Employees' Compensation Act or the Longshoremen's and Harbor Workers' Compensation Act. As we have shown, whichever Compensation Act provides the remedy, that remedy is exclusive and appellant's claim is not cognizable under the Tort Claims Act.



188 N.E. 870; Saintsing v. Steinbach Company, 1 N.J. Super. 259  
64 A. 2d 99; Texas Employers' Ins. Ass'n. v. Mitchell, 27 S.W.  
600 (Tex. Civil Appeals). <sup>13/</sup>

There can be no doubt in this case that the medical examination and communicated diagnosis which injured appellant arose out of and in the course of her employment as a government employee. Consequently, her exclusive remedy is to file a claim for compensation, and no liability for the injury may be assessed against the Government "under a Federal tort liability statute,

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<sup>13/</sup> Some courts have drawn a distinction between a medical examination or procedure required by the state and one required by the employer, holding that the former is not in the course of employment while the latter is, although the distinction has been criticized. See, 1 Larson's Workmen's Compensation Law (1965 ed.), § 27.32. However, in the present case, the medical examination was required by the employer (Tr. I. 67-69).

14/ If this Court agrees with both our argument that the Tort Claims Act's misrepresentation exception is applicable and our argument that appellant's exclusive remedy is under one of the workmen's compensation schemes for federal employees, it might be beneficial to appellant if this Court's decision is placed upon both grounds instead of just the misrepresentation exception. This might make a difference with respect to whether or not appellant can now file a claim for compensation.

Although the time for filing a claim for disability under the Federal Employees' Compensation Act is 60 days from the time of injury, the Secretary of Labor has the discretion to waive this requirement provided that the claim is filed within five years and the claimant has a sufficient reason explaining the failure to file within 60 days, 5 U.S.C. 8122(c). Thus, if appellant's remedy is under this statute, a claim filed now would probably be considered timely.

However, if appellant's remedy is under the Longshoremen's and Harbor Workers' Compensation Act, and we believe that it is, the basic time limit for filing claims is one year after the injury, 33 U.S.C. 913(a). However, that statute goes on to provide (33 U.S.C. 913(d)):

Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect to injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

If this Court rests its decision on the ground, inter alia, that appellant's remedy is under one or the other Compensation Act, the requirements of 33 U.S.C. 913(d) would be satisfied, and appellant would have one year from this Court's decision to file a claim.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

BAREFOOT SANDERS,  
Assistant Attorney General,

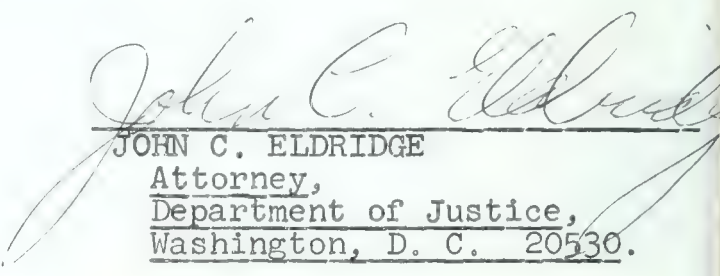
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November 1966.

CERTIFICATE OF COMPLIANCE  
WITH RULES 18 AND 19 OF THIS COURT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
JOHN C. ELDRIDGE  
Attorney,  
Department of Justice,  
Washington, D. C. 20530.

# United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 21212

SHARON DE LANGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court  
For the Southern District of California  
Southern Division

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## APPELLANT'S REPLY BRIEF

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DEC 19 1966

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 21212

SHARON DE LANGE,

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vs.

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Appellee.

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APPELLANT'S REPLY BRIEF

---

SUMMARY OF ARGUMENT

The Supreme Court's position in the Neustadt case and the Indian Towing case sets forth its position regarding the interpretation of 28 USC 2680 (h).

With regard to the appellee's second argument on the issue of Federal Employees' Compensation Act, appellant's position is that the injury did not arise out of or in the course of her employment as a government employee.

## ARGUMENT

### I

THE SUPREME COURT'S POSITION IN NEUSTADT AND INDIAN TOWING  
SETS FORTH ITS POSITION.

Appellee's Brief contains four distinct and contrary approaches toward an interpretation of 28 USC 2680 (h). All of these approaches are contrary to the plain language of the Supreme Court's statement in United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614, (1961) where the Court stated,

". . . Such a claim does not 'arise out of . . . misrepresentation,'  
any more than does one based upon a motor vehicle operator's  
negligence in giving a misleading turn signal. . . ."

The key to the Court's thinking is to determine whether or not the claim arose out of the misrepresentation itself or whether it arose as a result of negligent actions which were consummated by the misrepresentation as in the case at bar.

A reading of the footnote in United States v. Neustadt, supra, along with the case of Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955), clearly demonstrates the position of the Supreme Court and such reasoning should be binding upon this Court.

The government's arguments completely beg the question put before this Court; DID THE PLAINTIFF'S INJURY ARISE OUT OF THE MISREPRESENTATION?

a) First, the appellee argues (p. 7) that the Court should follow the literal meaning of 28 USC 2680 (h) when under the decision of Neustadt and

Court.

In support of this position appellee argues at length from the Hungerford decision which appellant has clearly stated should be reversed and not relied upon.

b) Second, the appellee quotes at length a number of decisions which would not involve commercial or financial interests. Suffice it to say that appellant's Opening Brief went into great length to analyze and distinguish these cases from the case at bar.

c) Next, appellee seeks to offer to this Court a distinction based upon whether or not the statement involves a verbal or written communication as distinguished from an action such as a turn signal. Thus, they would argue that a communication by way of a signal is to give rise to liability while verbal language would exclude the government from liability under the act. This analysis, as has been previously stated, flies directly in the face of the Neustadt decision and could not have been the intent of Congress.

d) Finally, by way of footnote 8, at page 15, of its Brief, appellee draws an analogy between the case at bar and a commercial or financial situation. Plaintiff's damages flow from a course of conduct and a communication on the part of a Navy doctor after plaintiff had been informed that she was no longer employed. Her damages clearly were physical and mental as set forth in the transcript from page 152, line 19, through page 154, line 10. This situation is one of personal injury to health and well-being caused by words spoken directly to plaintiff, as covered in appellant's Opening Brief, page 8.



## II

APPELLANT'S INJURY DID NOT ARISE OUT OF OR IN THE COURSE OF HER EMPLOYMENT AS A GOVERNMENT EMPLOYEE.

For the first time on appeal the government raises the issue that the appellant's claim is excepted from the coverage of the Federal Tort Claims Act by 5 USC (September 1966 revised), 8173.

The appellee attempts to demonstrate this on the basis that appellant has her remedy under the Longshoremen's and Harbor Workers' Compensation Act or the Federal Employees' Compensation Act.

The trial transcript demonstrates that the appellant was not employed at the time of the trial. (Tr. Vol. 1, p. 7, ll. 4-5). The record demonstrates that she was last employed July 19, 1964. (p. 7, ll. 14-16). She understood that she was being subjected to an employment physical (p. 8, ll. 19-21), and that the examination was solely for employment purposes (p. 32, ll. 3-7).

She was told on July 19 and July 20, 1964, that she could no longer work at her job (p. 13, ll. 8-10). She was further told that the test must be negative in order for her to maintain employment (p. 33, ll. 8-11). She was furthermore informed by the defendant that the government did not take care of syphilis and that she must retain a private physician (p. 14, ll. 2-14).

It was not until after she had been told that she was no longer employed that the inquiry began which led to the acts which form the basis of this claimed injury. In other words, it was only after she was told that she was no longer employed, that she could no longer work, that she asked for the reason for this, with

The examination was, in fact, a condition precedent to re-employment or continued employment. The Federal Employees' Liability Act provides coverage while an employee is ". . . in performance of his duties". 5 USC 1966 revision, Section 8102.

At the time the communications were made to the applicant, she was at home, and not performing any duty for the government. The employment services of a waitress are clearly not involved in the negligent acts complained of. Appellee cites Larson's Workmen's Compensation Law, 1965 Edition, Section 27.32, in support of its position. This section, however, in cases cited therein, are cases where inoculations were given as required by employers, or injections for infections and other disabilities resultant from the inoculations or negligently administered tests.

In this case, appellant makes no claim that the blood tests were negligently administered or that she suffered any disease as the result of any infection or other improper inoculation. The tortious conduct for which appellant complains occurred subsequent to the blood test and was a negligent course of conduct and an ineptness arising subsequent to and independent of the administering of the test.

Even in cases where infections have resulted from Wasserman tests themselves, compensation had been denied where public rules or regulations have required such tests. See King v. Arthur, 245 N.C. 599, 96 S.E. 2d 836 (1957) (Information resulting from blood test).

This case, therefore, did not arise while appellant was in the performance of her duty, but rather the actions which gave rise to appellant's claim occurred

out of performance of any duty of employment within the meaning of the Federal Employees Liability Act. 5 USC (1966 revised, Sections 8101-8150) or the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901-950).

### CONCLUSION

Appellee has failed to comment on the appellant's argument that to relieve United States of responsibility in such a case would place the burden upon the individual physician to defend himself. Appellant wishes merely to reiterate this position on public policy to the Court. A policy which will affect areas of litigation much broader than the area covered by the matter at bar.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded.

Respectfully submitted,

BEAR, GELFAND, GREER & BAUER

By: /s/ MICHAEL I. GREER

Attorneys for Appellant.

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules

/s/ MICHAEL I. GREER

No. 21253

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA for the use and benefit of  
FLOATING FLOORS, INC., a corporation,

*Appellant,*

*vs.*

FEDERAL INSURANCE COMPANY, a corporation,

*Appellee.*

---

On Appeal From the Judgment of the District Court of the  
United States, Southern District of California, Central  
Division.

---

## APPELLANT'S OPENING BRIEF.

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## APPELLANT'S OPENING BRIEF.

---

### Jurisdictional Statement.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered after an order granting appellee's Motion for Summary Judgment. The District Court's jurisdiction was invoked by reason of Sections 270a and 270b of Title 40 U.S.C. [R. 2.] Jurisdiction in the United States Court of Appeals for the Ninth Circuit was invoked by appellant's Notice of Appeal and jurisdiction here rests on Title 28, U.S.C., Section 1291. [R. 120.]

### Statement of the Case.

This is an action by appellant as supplier of certain flooring materials, to recover on a bond executed by appellee surety pursuant to Section 270a of Title 40 of the United States Code (commonly referred to as "The Miller Act"). [R. 2.]

### **1. The Nature of the Miller Act.**

The Miller Act establishes a remedy for persons other than the prime contractor who have supplied labor and material in the prosecution of the work provided for by a contract for the construction, alteration, or repair of any public building of the United States and who have not been paid in full. By the terms of Section 270a a payment bond must be posted, varying in amount, depending upon the underlying contract, for the protection of all such persons. By the terms of Section 270b such persons may commence suit to recover on the bond, assuming certain requirements are met. One of these is that any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the prime contractor furnishing the payment bond, shall give written notice to the prime contractor within 90 days from the date on which the person performed or furnished the last of the labor or material for which claim is made. The notice must contain certain items and must be sent in a specified manner. (See appendix.)

### **2. The Facts of This Case.**

On April 20, 1962 Murray J. Shiff Construction Co. (hereinafter referred to as Shiff) entered into a written contract with the United States of America whereby Shiff, for a consideration, agreed to furnish all labor and materials and perform all work required for the construction of the Combat Operations Center at March Air Force Base, California. [R. 2-3.]

On April 20, 1962 Shiff, as principal, and the appellee, as surety, executed and delivered (in compliance with Section 270a of Title 40 U.S.C.) a standard form payment bond mentioned above to the United States of America as obligee. [R. 3.]

On May 21, 1962 L. D. Reeder Company of Los Angeles, California (hereinafter referred to as Reeder) informed appellant that the former was to be awarded a subcontract by Shiff to furnish and install materials for the Raised Computer Floor System in the construction of the Combat Operations Center. [R. 52-53.] Reeder was awarded that subcontract and it thereafter entered into an agreement with appellant whereby the latter was to furnish Reeder all of the materials for the system, for which Reeder was to pay \$47,650.78. [R. 53.] In order to fulfill its agreement with Reeder, appellant made an agreement with Commercial Steel Company of Bel-Air, Maryland (hereafter referred to as Commercial) on October 30, 1962, under which Commercial agreed, except for vinyl floor tile, to furnish appellant all of the parts and material required for the raised computer floor system. [R. 53.] Except for vinyl tile, Commercial fabricated, manufactured and shipped the necessary parts and material from its plant at Bel-Air, Maryland consigned to Reeder, or Shiff in some cases. [R. 53.] All of the parts and materials for which claim is made in this suit, except the vinyl floor tile, were furnished as just described, including the replacement material mentioned hereafter. [R. 53.]

At the time each shipment was made, Commercial furnished appellant with a copy of the bill of lading, together with its invoice for the goods so furnished. [R. 53.] This procedure was also followed in the supply of the replacement materials hereinafter mentioned. [R. 54.] Both Reeder and Shiff were aware of the procedures followed in the shipment of the materials directly from Commercial. [R. 54.]

On February 20, 1964, appellant received a notification from Shiff that some of the materials supplied by



Commercial had not held up under testing and request was made of appellant that it inform Shiff what could be done to remedy the situation. [R. 101.] Appellant immediately contacted Commercial, informing it of the conversation which appellant had had with Shiff relating to the allegedly defective material. [R. 101.] Commercial informed appellant that it would furnish the replacement material at its own expense, if it appeared to its satisfaction that the panels had failed as a result of defects in manufacture. [R. 101.]

On March 17, 1964 appellant was again contacted by Shiff who informed the former that it was necessary that replacement materials be furnished to the March Air Force Base job in order that the contract could be completed. [R. 102.] Appellant informed Shiff at that time that appellant had not been paid by Reeder and that it would be proper for Shiff to deal with its subcontractor Reeder, as it had done in the past, in order to secure the replacement material and that, if that procedure were followed, appellant would hopefully make some arrangement with Reeder by which Reeder's account would be paid. [R. 102.] At no time was Shiff informed that appellant would not furnish the replacement material. [R. 103.]

In the meantime, Commercial, pursuant to appellant's notification to it of the necessity of manufacturing replacement material, proceeded to manufacture the material according to a list of it given to it by appellant. [R. 103, 111.] Commercial, following the manufacture of the replacement material for appellant, held the panels at its plant, pending determination as to whose responsibility it was, as between Commercial and appellant, to pay for the replacement material. [R. 103, 111.]

While Commercial was holding the material manufactured for appellant, Shiff requested Commercial to sell it (Shiff) the replacement material. [R. 111.] Commercial thereafter shipped the panels it held for appellant to Shiff on March 23, 1964. [R. 74.]

Following this shipment, when it had not yet been paid the \$47,657.78 for the material it had supplied, appellant notified Shiff pursuant to Section 270b of the Miller Act on June 12, 1964. [R. 4, 73.]

Appellant filed its complaint on March 22, 1965. [R. 2.] Appellee, Shiff's payment bond surety, filed its Answer to the Complaint alleging the notice on June 12, 1964 was untimely. [R. 9.] No issue is made as to the form or manner of transmission of the notice. Subsequently appellee made a motion for summary judgment which was denied. [R. 61.] Thereafter, appellee made another motion for a summary judgment which was granted by the court. [R. 119.]

This appeal followed.

#### **Specification of Errors Relied On.**

1. The court erred when it concluded that appellant failed to give notice of non-payment within ninety days from the time it last furnished material pursuant to its contract.
2. The court erred when it concluded that appellant was not entitled to rely upon the replacement materials subsequently furnished to the prime contractor as being the material last furnished by appellant pursuant to its contract.

3. The court erred when it concluded that appellant furnished no additional material subsequent to October 31, 1963.
4. The court erred when it concluded the record failed to present evidence that appellant, in fact, furnished the replacement materials to the prime contractor.
5. The court erred when it granted judgment for the appellee, since there were genuine issues of material fact in dispute.
6. The court erred when it concluded that there was no genuine issue of material fact presented concerning whether appellant had supplied the replacement material.
7. The court erred when it concluded that there was no genuine issue of material fact presented showing that Commercial had manufactured and was holding the replacement materials for appellant and that, when the replacement materials were shipped by Commercial to the prime contractor, Shiff, they were already the property of appellant, and, as such, were furnished by the latter.
8. The court erred when it concluded there was no genuine issue of material fact presented concerning whether appellant gave notice to Shiff within ninety days from the time the former last furnished material.

**Questions Presented Are as Follows.**

1. Was a genuine issue of material fact presented by affidavits filed by appellant in opposition to appellee's motion for summary judgment showing that appellant had in fact supplied the replacement panels, where the affidavits revealed that Commercial had manufactured the replacement panels at the request of and according to the specifications of appellant, and was holding the replacement panels until such time as appellant would notify Commercial as to their disposition?
2. Was a genuine issue of material fact presented by affidavits filed by the appellant in opposition to the appellee's motion for summary judgment showing that appellant had given notice to Shiff, the prime contractor, within 90 days from the time appellant last supplied materials for the project?

**Summary of Argument.**

The replacement panels for the Raised Computer Floor System which were supplied to the project in March, 1964 were materials Commercial had manufactured and was holding for the appellant, and, when the same were supplied to Shiff by Commercial on March 31, 1964, the latter was sending materials belonging to the appellant. As such, the appellant last furnished materials for the project on March 31, 1964. A notice under the Miller Act given on June 12, 1964 was therefore timely.

All of the foregoing facts were presented by the affidavits of Michael P. Beere and Robert Jendrek. For the court to conclude that no genuine issue of material fact existed was to err.

## ARGUMENT.

### I.

**There Is a Genuine Issue of Material Fact Presented by the Affidavits Showing That the Replacement Material Was Supplied by Appellant.**

An analysis of the affidavit of Michael P. Beere, President of appellant, reveals the following. Shortly after February 17, 1964 Mr. Beere received a call from a Mr. Glick who identified himself as a representative of Shiff who had informed Mr. Beere that "some of the panels at the March Air Force Base job had not held up and he wanted to find out what could be done to remedy this situation." [R. 101.] Mr. Beere wrote down a list of the defective panels indicated by Mr. Glick and assured the latter that he would look into the situation relative to the defective panels. [R. 101.]

Mr. Beere on February 20, 1964 telephoned Commercial and informed it of his conversation with Mr. Glick and told Commercial that the replacement panels were immediately needed on the project because some of the panels previously furnished by Commercial to appellant had failed. [R. 101.] Further, Shiff and the government were taking the position that Reeder's work was not complete and therefore appellant's contract had not been completed. [R. 101.] The person with whom Beere spoke, Robert Jendrek, said that Commercial would furnish the panels at its own expense if it appeared that the panels had failed as a result of manufacture, but not otherwise. [R. 101.] Jendrek was at that time given the list of the replacement panels which had been given to Beere by Glick. [R. 102.]

On March 17, 1964 Shiff again contacted appellant and spoke with Mr. Beere. [R. 102.] Again Mr.



Beere was informed of the necessity that the replacement panels be furnished to the job in order that the contract would be completed there. [R. 102.] Shiff told appellant that the replacement panels conforming to the contracting requirements would have to be furnished by Reeder, appellant, and Commercial. [R. 102.]

Following the conversation last mentioned between Shiff and appellant, Beere again called Commercial and informed Jendrek of his conversation with Shiff and inquired as to what Commercial was doing about the replacement panels. [R. 103.] Jendrek indicated that he had the panels at the plant ready to go; but was still not satisfied as to whose responsibility it was to replace them. [R. 103.]

An analysis of the affidavit of Robert S. Jendrek the person referred to above, reveals the following. Jendrek substantiates Beere's statement regarding the telephone call on February 20, 1964 and the fact that Beere informed him that there were defective panels which had to be replaced. [R. 110.] Beere instructed him to hold the replacement panels until Commercial heard further from appellant. [R. 111.] Thereupon the replacement panels were manufactured by Commercial according to the list Beere had given Jendrek and were held by Commercial for appellant until their shipment to Shiff. [R. 111.] Jendrek also indicates in his affidavit that he informed Shiff, when the inquiry was made by the latter, prior to shipment, that the replacement panels had already been manufactured in accordance with instruction from appellant. [R. 111.]

What did the appellee indicate in its affidavits to show that the action had no merit?

An analysis of the affidavit of Daniel Preger reveals the following. Appellee admits from May 11, 1962 until April 18, 1963 Reeder purchased the floors from appellant who in turn acquired them from Commercial. [R. 73.] Appellee admits Shiff received notice from appellant's attorney both on March 27, 1964 and on June 12, 1964 indicating appellant had not been paid by Reeder. [R. 73.] Appellee admits that Shiff called appellant on March 17, 1964 and asked appellant to submit replacement panels. [R. 74.] Appellee admits the replacement panels were shipped by Commercial to Shiff on March 23, 1964 but did not arrive in Los Angeles, the designated place of delivery, until March 31, 1964. [R. 74, 75.]

Mr. Preger further indicates that he was informed by appellant, without identifying the person, at the time of the March 17, 1964 phone call that appellant would not ship the replacement panels. [R. 74.] In contrast, Beere's affidavit indicates that in his telephone conversation on March 17, 1964 with Shiff he did not tell Shiff appellant refused to supply the replacement panels. [R. 103.] Mr. Beere categorically denies that he, or anyone else representing appellant, at any time refused to furnish the replacement panels. [R. 103.]

Subsequent to the filing of Preger's first affidavit, another affidavit by him was filed along with the affidavit of Howard A. Shiff, in which both state, in substance, that Howard A. Shiff on March 17, 1964 talked with one Joseph W. Kelley of appellant who allegedly told Shiff that appellant refused to ship the replacement panels. [R. 94-95, 97-98.]

In contrast, the affidavit of Beere indicates that on March 17, 1964 Mr. Kelley was not in New York but

was out of the country, and that he, Beere, talked with someone from Shiff on that date as related above in the analysis of Beere's affidavit. [R. 102.]

Under the circumstances, appellant contends that there was a genuine issue of material fact presented concerning whether appellant had supplied the replacement panels. Appellant's affidavits show that the replacement material had been manufactured by Commercial for appellant, was being held for appellant pending further instructions from appellant, and that at the time it was furnished to Shiff, it was the property of appellant. Factually, the present case is very similar to *United States for the Use and Benefit of P. A. Bourquin & Co., Inc. v. Chester Const. Co., Inc., et al.*, 104 F. 2d 648 (2d Cir. 1939). In the latter case, the plaintiff, a lathing subcontractor, left the job on January 28 without completing certain cornice work. However, he left the necessary materials for the purpose of finishing the cornice. Subsequently, in April of the same year, the plastering subcontractor, to whom the plaintiff was a subcontractor, did the cornice work as an accommodation to the plaintiff with the understanding that plaintiff would be charged therefor. The cost of doing the work and the amount which the plaintiff was backcharged was \$14.50. The plaintiff gave his Miller Act notice predicated upon completion of the cornice by the employees of the plastering subcontractor and the court sustained his position, holding that the plaintiff did the last of the work in April, not January, and that a notice within 90 days of the April date was good.

As related above, both the affidavits of Michael P. Beere and Robert S. Jendrek present sufficient evi-

dence to show that Commercial, at the behest of the appellant, had manufactured the replacement panels for appellant and was holding them for appellant's use when the inquiry came from Shiff in 1964. When the panels were shipped to Shiff on March 23, 1964, they were in fact, appellant's panels and, as such, appellant's last furnishing occurred on March 31, 1964, the date of arrival.

It should also be remembered that Commercial, as it had done in the past, forwarded an invoice for the replacement panels to appellant, indicating that Commercial considered that it had supplied material belonging to appellant. [R. 54.]

Where title to goods lies, under the applicable California law, is a matter to be determined by the intention of the parties. *Southern Pacific Company v. Hyman-Michaels Company*, 63 Cal. App. 2d 757, 147 P. 2d 692 (1944).

A case, though not involving a suit on a Miller Act bond, but presenting a similar question as to who actually owned and supplied certain materials is *Gruber v. Wm. Coady and Co.*, 199 F. 2d 544 (5th Cir.). In this case the plaintiff was claiming it was entitled to proceeds from the sale of meat by one of the defendants to the government. Plaintiff's claim was based on its contention that title had never passed from it to the defendant seller and, therefore, the defendant could have secured no title which it purported to pass on to the government. The trial court granted defendant's motion for summary judgment, but this was reversed on appeal. After setting out the various contentions concerning where title lay at the time of the delivery of

the meat to the government, the court stated on page 557:

“What and all that we are holding is that, with these countercontentions of fact and law unresolved, it cannot be said that the case was one for summary judgment. On the contrary, it was one for determination on a trial and not on a motion as to which set of facts was really true and the legal result of those facts when found.”

Appellant contends that the court erred in holding there was no genuine issue of material fact presented showing appellant supplied the replacement panels.

## II.

### **There Is A Genuine Issue of Material Fact Presented by the Affidavits Showing the Notice on June 12, 1964 Was Timely.**

A case similar factually to the present case is *United States v. Gunnar I. Johnson & Son, Inc.*, 310 F. 2d 899 (8th Cir., 1962). In the latter case, the plaintiff had supplied materials for an entire electrical distribution system to the job site, the last material having been furnished on December 23, 1959. However, two bus duct elbows were defective and were returned to the factory for alteration. Subsequently, on April 5, 1960 these two elbows were supplied from the factory to the job. The court held that the time commenced to run, for purposes of giving the 90-day Miller Act notice from April 5, 1960. The court stated:

“it is obvious that said bus duct elbows are a part of the material ‘for which the claim is made.’ Regardless of how these items were handled from a bookkeeping standpoint, or invoiced or billed, it is



apparent that, until such time as they were 'furnished' in such a condition as to meet the engineering requirement and be ready and fit for installation as a part of the system, no enforceable claim did or could arise. Neither the original shipment of these items on December 23, 1959 nor the premature and unenforceable billing thereof by invoice on January 12, 1960, gave rise to an enforceable claim therefor. An enforceable claim therefor arose for the first time when they were 'furnished' in useable condition, subsequent to their necessary alteration, and regardless of the fact that such reshipment was on a 'no charge' basis. We therefore hold that under the evidence herein, such duct elbows were 'furnished' on April 5, 1960, that the notice herein involved was timely, and that the findings of the trial court hereinabove quoted are clearly erroneous."

Factually, this case is similar to another case previously decided by this court, *United States of America for the Use and Benefit of Barney Austin v. Western Electric Co., Inc., et al.*, 337 F. 2d 568 (1964, 9th Cir.). In the latter case the issue was whether the plaintiff had filed its suit within one year from the last time it had furnished material to the construction project, in compliance with the Miller Act requirement on the time of institution of suit. The trial court had granted defendant's Motion for summary judgment, but on appeal this was reversed by this court. On page 574 of the opinion the court says:

"The testimony with respect to what work, if any, Barber did on December 7, 8 and 9 is inconclusive and it cannot be determined from the records

whether this work may have been a part of the original contract, or corrections and repairs subsequent to completion of the contract.”

The court continues on page 575:

“Viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the plaintiff we cannot say that there is no genuine issue of fact with respect

2. To whether work was performed on or after December 7, 1960, and
2. Whether any work which may have been performed on or after that date was required to complete the subcontract of the plaintiff Austin.”

A third case bearing upon the timeliness of appellant's notice is *P. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company*, 297 F. 2d 337 (1961, 10th Cir.) In this case the sole issue is whether the demand for payment was timely within the meaning of the notice provisions of the Miller Act. The facts of the case were that Scholes, prime contractor, sublet a portion of the work to Hardeman Construction Co. which in turn entered into a contract with the plaintiff for the latter to furnish 1095 feet of 30 inch pipe needed on the job. About one year later and after some 800 feet of the pipe had been furnished on credit Hardeman was relieved of its obligation under the subcontract and Scholes undertook to complete the work called for therein. A short time later Lock Joint received by telephone, an order for 198 feet of the 30 inch pipe for his job. The order was filled, the pipe was used in

the work provided for in the subcontract, and an invoice was forwarded to Hardeman. The latter notified plaintiff that it was no longer on the job and that the invoice should be sent to Scholes. The invoice was forwarded to Scholes. Prior to receiving payment for any of the materials furnished, Lock Joint notified Scholes that it was looking to it for payment of the entire balance owing on the materials supplied for the job, including the 198 feet of pipe ordered by Scholes. Thereafter, Scholes paid for the 198 feet of pipe, but refused to pay for the 800 feet of pipe used by Hardeman.

On page 338 of the opinion that court says:

“It is stipulated that the notice for payment sent by Lock Joint to Scholes was within 90 days after the delivery of the 198 feet of pipe and, if, as the trial court found, this last delivery was made pursuant to the material man’s contract between Hardman and Lock Joint, the notice met the requirements of the act.”

The affidavits of Michael P. Beere and Robert S. Jendrek both evidence an intent on the part of Shiff, appellant, and Commercial that the replacement panels be furnished in order that appellant’s contract be fulfilled. In his affidavit Mr. Beere states:

“The conversation in which we engaged on that occasion [referring to the conversation on March 17, 1964 between Beere and Shiff] again related to the necessity that replacement panels be furnished to the March Air Force Base job in order that the contract could be completed there. Shiff’s representative told me that the Federal government was claiming that the floor system was partially defec-

tive, did not meet the requirements of or otherwise fulfill the contract, and that new panels conforming to the contract requirements would have to be furnished by Reeder, Floating Floors and Commercial Steel." [R. 102.]

### III.

**It Is Well Established by the Decisions of This Court That the Miller Act Is Remedial in Nature and Is Entitled to a Liberal Construction in Order to Effectuate the Legislative Intent to Protect Those Whose Labor and Material Go Into Public Projects.**

In *United States v. Endebrock-White Company*, 275 F. 2d 57 (1960, 4th Cir.), Westinghouse, on December 31, 1957, furnished certain bushings worth \$2.11 for use on a Miller Act project. The bulk of its furnishing had previously been performed, ending on October 16, 1957. The Miller Act notice given by Westinghouse as related to the October 16 date was too late. However, the court held that the furnishing of bushings, although only worth \$2.11, was for use in the prosecution of the particular Miller Act project, or at least were reasonably believed by Westinghouse to be intended for such use and that the Miller Act notice predicated on December 31, 1957 delivery was timely. The court in reaching its conclusion quoted with favor the decision in *United States v. Dickstein*, 157 Fed. Supp. 126 (D.C.).

"The Miller Act is highly remedial in character and is entitled to a liberal construction and application in order properly to effectuate the congressional intent to protect those who furnish labor or materials for public works."

To the same effect is *Apache Power Company v. Ashton Company*, 264 F. 2d 417 (1959, 9th Cir.).

Obviously, it is demonstrated by the affidavits of both Michael P. Beere and Robert S. Jendrek that Shiff, appellant, and Commercial believed that the replacement panels would have to come from Commercial and would be supplied to the job either at Commercial's expense or at appellant's expense.

In addition, the purpose behind the notice requirement of the Miller Act is completely fulfilled in this case. In *McWalters and Bartlett v. United States of America for the Use and Benefit of Lewis H. Wilson*, 272 F. 2d 291 (1959, 10th Cir.), the purpose of the ninety day notice was defined as follows on page 295 of the opinion:

"The purpose of the notice to the principal contractor is to enable him to protect himself against his subcontractor by withholding from him money due on his subcontract."

Appellee admits that Reeder had been fully paid by Shiff in July, 1963. [R. 23, 28, 29.] Consequently, it really makes no difference whether the ninety day notice was in fact given after the replacement material had been supplied. Reeder had been fully paid, and would not have been entitled to more money for the replacement material. Appellant is owed no money for the replacement material, inasmuch as its supplier Commercial, had been paid for it.



IV.

**If There Is a Doubt That There Exists a Genuine Issue of Material Fact a Motion for Summary Judgment Must Be Denied.**

In *United States of America for the Use and Benefit of J. A. Edwards & Co., Inc. v. Thompson Construction Corp., et al.*, 22 F.R.D. 100 (U.S.D.C.—N.Y.), an action by a plaintiff on a payment bond under the Miller Act based upon delivery by it of supplies to a subcontractor of the defendant prime contractor, and wherein the issue was whether notice had been timely given, the court stated that the evidence raised a material question of fact with respect to time of delivery of material, precluding granting of a motion for summary judgment. The court stated that even though the doubt may be small, a litigant has the right to a trial where there is the slightest doubt about the facts.

In *Traylor v. Black Sivalls & Bryson, Inc.*, 189 F. 2d 213 (8th Cir.), a case not involving a suit under the Miller Act, but wherein a plaintiff was claiming he was entitled to certain commissions and the defendant alleged there had been a modification of the plaintiff's employment contract prior to acceptance of the orders by the defendant, the court stated on page 216 of the opinion —

“A Summary Judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowances beyond all doubt. To warrant its entry, the facts conceded by the plaintiff, or demonstrated

beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that plaintiff would not be entitled to recover under any discernible circumstances.”

The court also states in this opinion that all reasonable doubts concerning the existence of an issue as to a material fact must be resolved against the party moving for summary judgment.

The same reasoning led the court in *Mistretta v. S.S. Ocean Evelyn*, 243 Fed. Supp. 86 (U.S.D.C. N.Y., 1964), to hold that any inference which may be drawn from underlying facts contained in the papers before the court must be viewed in a light most favorable to the party opposing a motion for summary judgment.

### Conclusion.

Under the facts presented by the Affidavits, it cannot be concluded, as the District Court did, that there is no genuine issue of material fact concerning whether the appellant in fact last furnished material for the job on March 31, 1964 and concerning whether the notice given on June 12, 1964 was timely. For these reasons, the judgment below should be reversed.

DILLAVOU & COX,

By MICHAEL M. WEEKES,  
*Attorneys for Appellant.*

### **Certificate of Counsel.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL M. WEEKES



## APPENDIX.

### United States Code, Title 40.

#### Section 270b.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.





No. 21253

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# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA for the Use and Benefit of  
FLOATING FLOORS, INC., a corporation,

*Appellant,*

*vs.*

FEDERAL INSURANCE COMPANY, a corporation,

*Appellee.*

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On Appeal From the Judgment of the District Court of the  
United States, Southern District of California, Central  
Division.

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## APPELLEE'S RESPONSE TO OPENING BRIEF.

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No. 21253

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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FLOATING FLOORS, INC., a corporation,

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## APPELLEE'S RESPONSE TO OPENING BRIEF.

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The Jurisdictional Statement and Statement of the  
Case, as set forth on pages 1-5 of the appellant's brief,  
are accepted by the appellee.

### QUESTIONS PRESENTED.

1. Was a genuine issue of material fact presented  
by the various affidavits as to whether appellant had  
furnished the replacement materials on March 24, 1964,  
where the affidavits clearly show that the shipment of  
said materials was made pursuant to an independent  
contract between Shiff and Commercial?

2. Were genuine issues of material fact presented by the various affidavits as to whether appellant's notice of June 12, 1964, and commencement of suit on March 22, 1965, were timely, where the affidavits clearly show that said notice and commencement of suit were not within ninety days and one year, respectively, of the date upon which the appellant last furnished the materials for which a claim is being made?

### SUMMARY OF ARGUMENT.

The March 23, 1964 shipment of replacement materials to Shiff, by Commercial, was not a furnishing of materials by the appellant because the affidavits of both parties show that said shipment took place pursuant to an independent contract between Shiff and Commercial. Because the appellant did not furnish said materials and, because the last furnishing made by the appellant was, at the latest on October 31, 1963, the appellant's notice of June 12, 1964 was not timely and, for that reason, the appellant has no rights under the Miller Act to sue on the appellee's bond.

Even if the March 23, 1964 shipment is found to be a last furnishing by the appellant, it is still not entitled to bring this action because its claim for \$47,657.78 is for materials which were furnished before November 1, 1963, and for this reason the notice of June 12, 1964 is not timely because it is not within ninety days of the date upon which the materials, for which a Miller Act claim is made, were furnished.

## ARGUMENT.

### I.

In order for the appellant to have perfected its right to sue on the Miller Act bond, posted by the appellee as surety for Shiff, Section 270b(a) of that Act, 40 U.S.C., required the appellant to give written notice to Shiff "within ninety days from the date on which (appellant) did . . . furnish the last of the material for which . . . (a) claim (of nonpayment) is made." Furthermore, Section 270b(b), as amended, required the appellant to have commenced this suit before the "expiration of one year after the day on which the last of the . . . material was supplied by (it)." The satisfaction of these procedural requirements—of ninety day written notice and commencement of suit within one year of date of last furnishing—are "mandatory" and a strict condition precedent to the existence of any right of action, in the appellant, upon said bond. *United States for Use and Benefit of American Radiator & Standard Sanitary Corporation v. North-Western Engineering Co., et al.*, 122 F. 2d 600 (8th Cir., 1941); *United States for the Use and Benefit of Soda v. Montgomery, et al.*, 253 F. 2d 509 (3d Cir., 1958).

The sole issue in the instant case is whether or not the appellant has satisfied the procedural requirements of Section 270b. If it has not, then the foregoing authorities clearly show that, as a matter of law, the appellant does not have any rights under the Miller Act and, consequently, the disposal of appellant's action, based upon that Act, by Summary Judgment, was



proper. Did the appellant give written notice to Shiff within the ninety day period and did the appellant commence this action within the one year limitation?

It is to be first noted that there is no dispute as to the dates upon which written notice of nonpayment was given to Shiff by the appellant, nor is there a dispute as to the date upon which this action was commenced. These dates are June 12, 1964 and March 22, 1965, respectively (R. 78, 2). Furthermore, there is no dispute as to the fact that no later than October 31, 1963 the appellant had furnished all required materials to the project in the amount of \$47,657.78, pursuant to its contract with Reeder, a subcontractor of Shiff (R. 77). This controversy centers solely around the date of March 23, 1964. Upon this date Commercial shipped, pursuant to an order from Shiff, certain replacement panels directly and C.O.D. to Shiff (R. 80, 81). This fact is not controverted. But, what is controverted, is appellant's contention that the affidavits, on file herein, present a genuine issue of material fact as to whether it was appellant who furnished these replacement panels in light of the fact they were shipped directly from Commercial to Shiff. The record does not disclose any furnishings of material by appellant between October 31, 1963 and March 23, 1964 (R. 114). If October 31, 1963 is held to be the date of last furnishing, then the notice of June 12, 1964 was not within the ninety day period, nor was this action commenced within the one year limitation, and the appellant is not entitled to sue, on appellee's bond, under the Miller Act. As the appellee will now show, what the appellant erroneously claims to be issues of material fact are, really, just issues of immaterial facts and

issues of law, which may be decided, and were properly decided, by the court below.

The facts and the legal issues involved in the instant case are analogous to the case of *United States of America for the Use of Bernard J. Weithman and Charles M. Weithman, a partnership, dba Weithman Masonry and Const. v. The Buckeye Union Casualty Company*, 207 Fed. Supp. 552 (1962) (USD Ct. M.D. Ohio, E.D.). In that case, plaintiffs were subcontractors for Horace L. Lurie Inc. Lurie had a contract with the United States for the repair and alteration of a Post Office. Defendant posted the bond, required by Section 270a of the Miller Act, as surety for Lurie. The facts, as stipulated, disclosed that April 28, 1960 was the last date upon which the plaintiffs supplied labor or materials for the project. The action was filed on July 31, 1961. On August 15, 1960 Lurie hired one Cleo Miller "to repair . . . improper caulking . . ." on the work done by plaintiffs. Miller submitted a bill for such repair work directly to Lurie and was subsequently paid therefor.

The plaintiffs argued, during trial that the filing of its action on July 31, 1961 was timely.

'It (was) plaintiffs' contention that Lurie was obligated to make a demand that any improper work be repaired by the subcontractor rather than hire a third person to do so. Consequently, plaintiffs claim to be entitled to utilize the date upon which the 3d person completed his work, in determining the time from which the limitation period begins to run as against the plaintiffs.'

The Court held that the plaintiffs were not entitled to recover judgment against the bond, and said,

“Plaintiffs have cited no authority supporting the claim that the Miller Act limitation period should run from a date on which a 3d person did work in the nature of repairs on the same project which plaintiffs worked on.”

“The Court is of the opinion that the language of the last two words of Section 270b ‘by him’ (emphasis added) refers back to ‘the person suing’ as set forth in that Section, and not to some other person. As plaintiffs are ‘the person suing’ their right to sue expired on April 28, 1961.”

As can be seen, the facts of the *Weithman* case are almost identical to the undisputed material facts of the instant case in the following respects:

1. In the *Weithman* case, the plaintiffs themselves did not furnish any labor or materials after April 28, 1960. This date was more than one year before the date on which the plaintiffs filed their Miller Act suit—July 31, 1961.

In the instant case, it is clear that the plaintiff itself did not furnish any materials to the project after October 31, 1963 (R. 114). The date of October 31, 1963 was more than ninety days before the date on which the plaintiff served its notice of non-payment—July 12, 1964—and more than one year before the plaintiff filed its Miller Act suit—March 22, 1965.

2. In the *Weithman* case, the plaintiffs attempted to take advantage of the fact that certain repair work was done by a third party, under an independent service contract, in August of 1960. This date was not more

than one year before the filing date of plaintiffs suit and if plaintiffs had prevailed, they would have been entitled to judgment.

In the instant case, the appellant is also trying to take advantage of an independent contract between Shiff and Commercial by arguing that the replacement panels, which were shipped by Commercial, were really panels belonging to the appellant. Does the record, and do the authorities, support appellant's contention?

An analysis of the various affidavits disclose that:

(a) On March 17, 1964, a telephone call was made by Mr. Howard A. Shiff to "someone" in the office of the appellant. Appellee, in its supporting affidavits, claimed that this "someone" was a Mr. Joseph W. Kelly (R. 94-95, 97-98). Appellant, on the other hand, claims that Mr. Kelly was out of the country on that date and that this "someone", with whom Mr. Shiff spoke, was a Mr. Michael P. Beere, manager and now president of appellant R. 102). While appellee must admit that this is an issue of fact as to whether it was Mr. Kelly or Mr. Beere with whom Mr. Shiff spoke, it is appellee's contention that it is really just an issue of an immaterial fact. It is not really material to the issues of this case to determine whether it was Mr. Kelly or Mr. Beere who was contacted. What is material is that both parties admit that "someone" who was acting on behalf of appellant as its representative, and Mr. Beere admits to having been manager of the appellant at that time, was contacted by Shiff (R. 100).

(b) In the telephone conversation between Shiff and the representative from appellant on March 17, 1964, Shiff was told that Floating Floors would not furnish the replacement panels and that Shiff should proceed through Reeder. This is the only reasonable construction of the following pertinent part from Mr. Beere's affidavit. "Shiff's representative asked me to have Floating Floors furnish the required replacement panels and I suggested to him in reply that inasmuch as his sub-contract was with Reeder, he should initiate his request through that firm in accordance with customary practices in the industry . . ." (R. 102).

Thus, the undisputed material fact is that the appellant told Shiff to proceed through Reeder and not Floating Floors since Shiff's contract was with Reeder. Although the appellee claimed that the appellant "unqualifiedly" refused to ship the replacement panels to Shiff (R. 94-95, 97-98), the opposing contention of the appellant that it did not outrightly refuse to ship said panels (R. 103) does not give rise to an issue of material fact in light of the quote above, from Mr. Beere's affidavit. It is really immaterial whether the refusal to ship was "unqualified" or just by way of implication by telling Shiff to proceed through Reeder and not Floating Floors.

(c) On or about February 20, 1964, Mr. Beere called Commercial, in Maryland, and spoke with a Mr. Robert Jendrek, Commercial's vice president (R. 102, 110). At that time, Mr. Beere dictated to Mr. Jendrek a list—received by Mr. Beere from Shiff—of panels which would be needed to replace some defective panels installed at the project (R. 102, 111). After this con-



versation, Commercial proceeded to manufacture the replacement panels in accordance with said list (R. 111). From these facts, appellant claims that "(its) affidavits show that the replacement material had been manufactured by Commercial for appellant, was being held for appellant pending further instructions from appellant and that at the time it was furnished to Shift, it was the property of appellant." (Appellant's Br. p. 11). The foregoing facts do not clearly establish the ultimate fact that the replacement panels were the property of the appellant and, even if we assume that they do, facts, not discussed by appellant, but which appear in appellant's affidavits, clearly negate any such conclusion.

The affidavit of Mr. Michael Beere shows that during the phone call to Commercial's Mr. Jendrek, on February 20, 1964, that after giving Mr. Jendrek the list of replacement panels which would be needed, Mr. Beere said "(I) told Mr. Jendrek that I expected Commercial Steel would be called upon to manufacture and furnish the replacement panels inasmuch as such panels were not readily available elsewhere." (R. 102). Furthermore, in that conversation, "Mr. Jendrek said that Commercial Steel would furnish the replacement panels at its own expense if it appeared to his satisfaction that the panels failed as a result of defects in the manufacture but not if the defects resulted from misuse or improper installation." (R. 101). And, "Mr. Beere stated that he would have to get more information about the statutes of the project in order to determine just how we could handle the problem and therefore to hold the new panels until we or Commercial Steel heard from him at Floating Floors. We thereupon proceeded to

manufacture the panels . . ." (R. 111). This problem to which Mr. Jendrek refers was the problem of determining whose responsibility it was to replace the defective panels inasmuch as Mr. Beere told Mr. Jendrek that because the floor system was being used and the defective panels we installed under machinery, Commercial would not have the opportunity to inspect these defective panels until the replacements were installed (R. 111). It is again noted that this opportunity to inspect was a condition to a furnishing of the replacements at Commercial's own expense (R. 101).

Thus, it can be seen from the foregoing analysis that on or about February 20, 1964 no contractual obligation for the furnishing of replacement panels was undertaken by appellant. The manufacturing of these panels, as the affidavits show, was not specifically for appellant, as claimed, but was done because Commercial knew it would be called upon to manufacture replacements and, if there was a manufacturing defect, it would have to furnish them at its own expense. If there was misuse or improper installation, Commercial would be paid by the responsible party. The manufacturing of these panels was for Commercial's inventory and not for the appellant or appellee since neither had admitted liability and neither had agreed to pay for them.

Even as late as March 17, 1964 the issue as to whose responsibility it was for the furnishing of these replacement panels had not been resolved (R. 103). Because appellant at no time had contracted for the manufacture of these panels, by admitting liability, ordering them and agreeing to pay for them, they were, on March 23, 1964, the date of shipment, the property of Commercial, and held in their inventory.

Appellant cites the case of *Southern Pacific Company v. Hyman-Michaels Company*, 63 Cal. App. 2d 757, 147 P. 2d 692 (1944) for the proposition that "Where title to goods lies, under the applicable California law, is a matter to be determined by the intentions of the party." (App. Br. p. 12). Without any discussion of this case by the appellant, the appellee is hard to put to see its relevance. That case was concerned with the issue of when does title to personal property pass to a purchaser under a valid contract of sale where the purchase price included the terms "transportation F.O.B." The case was concerned solely with the construction of a contract term. Once again, the appellant has misapplied a legal principle. The issue of whether the appellant or Commercial had the title to the replacement panels is not involved because the record does not show that the appellant had undertaken any contractual obligation for the purchasing of these panels (R. 114). Since the facts do not show that the appellant had entered into a contract, the panels were, at all times, the property of Commercial and, as a matter of course, the issue as to title, as in the *Southern Pacific* case where a valid contract existed, does not arise.

The case of *Gruber v. Wm. Coady and Co.*, 199 F. 2d 554, cited on page 12 of the appellant's brief, also does not lend support to the appellant's argument. In that case plaintiff sold, and shipped, meat to defendant "Chicago" who resold to the Navy Department. A purported assignment was made by "defendant Chicago" to defendant "Discount" of the right to receive the Navy payment. Plaintiff claimed that the check given to it by defendant "Chicago" was fraudulently issued because of NSF and therefore the assignment to

"Discount" by "Chicago" was the same as if made without consideration and was void. Thus, plaintiff claimed that title to the meat had not passed to "Chicago" because of the fraud, even though the meat had been shipped by the plaintiff. "Discount" claimed that plaintiff had agreed to accept an open check and for that reason title passed to "Chicago" and the assignment was valid and "Discount" was entitled to the money.

As can be seen, the *Gruber* case did involve numerous factual issues such as: (1) was "Chicago's" check fraudulently issued? (2) Did plaintiff agree to accept an open check? In the *Gruber* case the facts showed a contract for the sale of the meat existed between plaintiff and "Chicago". The issue of whether or not it was a valid contract was a legal issue which could only be resolved by making certain factual findings. In the instant case, as the appellee has shown in its discussion of the affidavits, there is no issue of material fact. The appellant has never claimed, nor do the facts show, that it had a contract for the purchase of the replacement panels. The replacement panels were shipped directly from Commercial to Shiff and were not shipped by the appellant.

The final authority cited by appellant as support for its first argument is the case of *United States for the Use and Benefit of P. A. Bourguin & Co., Inc. v. Chester Co., Inc., et al.*, 104 F. 2d 648 (2d Cir., 1939). The case is not "factually very similar" to the instant case, as the appellant contends (App. Br. p. 11). In that case, the plaintiff, a lathing subcontractor, left the jobsite on January 28. However, when plaintiff left the job at that time "(it had) completed all the work re-

quired under its subcontract except the framing and lathing for a cornice . . .”, and “no detail plan for such cornice construction was furnished until about the middle of April.” The necessary materials for the completion of the cornice work were left at the job site by plaintiff. Subsequently, in April of the same year, one Fitzgerald, one of the men working for the plastering subcontractor, completed the cornice work as an accommodation to the plaintiff and plaintiff was billed therefor.

In holding that the plaintiff performed labor, pursuant to its subcontract, in April, and that a Miller Act notice within ninety days of the April date was good, the court said that:

“The foregoing evidence is sufficient to support a finding that in April (plaintiff) *through Fitzgerald* ‘performed the last of the labor for which its claim was made.’ ” 104 F. 2d 648, 649.

That case is clearly distinguishable from the instant case for the following reasons:

1. In the former, the plaintiff had not completed its performance under its subcontract in January because the “detail plan” for the cornice work was not forthcoming until mid-April. In the instant case, the appellant had completed all of the furnishing of the materials, required by its subcontract with Reeder, by October 31, 1963 (R. 77).

2. In the former, the materials were left by the plaintiff and when the plan for the cornice was issued, the work under the subcontract was completed as an “accommodation” to the plaintiff. The plaintiff was billed for—and paid for—this “accommodation” work.



In the instant case, the facts show that the shipment, by Commercial, on March 23, 1964, was not an "accommodation" to the appellant for which it was billed, because as late as March 17, 1964 appellant had not admitted responsibility for the defective panels and had not agreed to pay for their replacement (R. 103).

3. In the former, the plaintiff was billed for the "accommodation" labor and subsequently paid for such labor. In the instant case, the billing for the replacement materials went directly to Shiff, and not the appellant, and was paid for by Shiff, and not the appellant (R. 80-82).

4. And, in the *Bourquin* case, the court found that the plaintiff had labored "through Fitzgerald" because the plaintiff had agreed to pay the "accommodation" labor charge. In the instant case, the court found that the appellant did not furnish the replacement panels "through" Commercial because, at no time, did the appellant undertake a contractual obligation to pay for them.

It is the appellee's contention that:

(1) Because the record shows that on March 17, 1964 the issue of the responsibility of replacing the defective panels had not been resolved (R. 103); (2) and because nowhere in the record does the appellant show that it had undertaken a contractual obligation to pay for these panels (R. 114); (3) and because the record does show that Shiff ordered the replacement panels, itself, directly from Commercial in March, 1964 (R. 111) and these panels were shipped directly to Shiff on C.O.D. terms (R. 80), and these panels were paid for by a certified check from Shiff to Commer-

cial (R. 82), there is no genuine issue of material facts whether these replacement panels were shipped by the appellant.

Therefore, it is the appellee's contention that: (1) Because the record indisputably establishes the fact that a separate contract for these replacement panels existed between Shiff and Commercial; (2) because the appellant

“(has) cited no authority supporting the claim that the Miller Act limitation period should run from (the) date on which a third person (Commercial) did work in the nature of repairs on the same project which (appellant) worked on.”

*Weithman* case, *supra*; (3) and, because the construction of the language of the two words “by him” (as set forth in Section 270b) offered by the *Weithman* court, that “the person suing” must be the one to have last furnished materials to the bonded project, is a reasonable and proper one, the District Court was correct in deciding that, as a matter of law,

“use plaintiff forfeited its right to sue under the Miller Act, 40 U.S.C., Section 270b(a), by its failure to give notice of nonpayment within ninety days from the time it last furnished materials (October 31, 1963) . . .” (R. 113).

and was correct in granting a Summary Judgment in favor of the appellee.

## II.

Even if this court decides that the foregoing analysis and application of authorities is improper, and decides that the furnishing of the replacement panels by Com-

mercial on March 23, 1964, was a furnishing by the appellant within the meaning of the Miller Act, the appellant is still not entitled to recover on the appellee's bond. The reason for this is that the appellant's notice on June 12, 1964 was not "within ninety days from the date on which (appellant) . . . furnished or supplied the last of the material for which such claim is made . . .", 40 U.S.C., Section 270b.

Appellant's claim is for \$47,657.78 (R. 5). All of the materials for which such claim is made were furnished to the project by October 31, 1963 (R. 77). Furthermore, "appellant is owed no money for the replacement material, inasmuch as its supplier, Commercial, had been paid for it." (Appellant's Br. p. 18). Since the appellant, by its own admission, is not making a claim for the replacement materials furnished on March 23, 1964 — assuming that this was a furnishing by the appellant — it can only be concluded from the record that its claim is for the materials last furnished up to October 31, 1963. The notice of June 12, 1964 was more than ninety days from this date. How then can the appellant claim that there is a genuine issue of material facts as to whether or not its June 12, 1964 notice was timely?

On page 13 of its brief, appellant cites the case of *United States v. Gunnar I. Johnson & Son, Inc.*, 310 F. 2d 889 (8th Cir., 1962) as being "a case similar factually to the present case." Once again, the appellant claims that an authority is "factually similar" and then leaves this court and the appellee to be on their own to determine in what ways the case is similar to the present one. The appellee contends that said case is factually dissimilar and for that reason its point of

law is not applicable to the case at bar. While the facts of that case as cited are correct, the quote therefrom is materially incomplete and totally misleading. The following is an enlargement of said quote:

“However, the stipulated facts do disclose that the bus duct elbows were component parts of the entire electrical equipment distribution system; that this system was engineered for this specific project; that said ducts were essential component parts without which the system was incomplete; that, at the time they were initially shipped on December 20, 1959, they were in such a defective or improperly prepared condition that they could not be installed in the system; and that they after being altered in order to meet the requirements for their installation into the system, they were reshipped from the factory to the job site on April 5, 1960 ...” 310 F. 2d 899, 903.

The court then continued with the quote as found on pages 13-14 of the appellant's brief. After so holding, the court said:

“Factually and in principle this case is readily distinguishable from those cases involving the performance of labor and supplying minor items of materials for the purpose of correcting defects, or making repairs following inspection of the project, and not performed or supplied as part of the original contract.” 310 F. 2d 899, 903.

The *Johnson* case is factually distinguishable from the instant case for the following reasons:

1. In the former, the facts showed that the bus duct elbows were essential component parts without which the entire electrical system was incapable of func-

tioning. In the instant case, any given panel was not an essential part to the whole of the flooring system so that, without said panel, the flooring system could not be installed.

2. In the former, the original bus duct elbows shipped under the construction contract on December 20, 1959 were so defective that they could not be installed at the time of said shipment. The fact that installation of the system, and the beginning of its performance, was impossible without these component parts is what made the original contract incomplete. In the instant case, the entire flooring system was installed and was in active use (R. 111). It was only after the flooring system had begun to be used that certain panels were found to have "not held up" and were considered to be defective (R. 101). From these facts it must be concluded that, as of October 31, 1963, appellant had fully completed performance under its contract with Reeder because in appellant's letter to Shiff on March 27, 1964 it was claimed that as of October 31, 1963 appellant had furnished materials to the project which were of the value of \$47,657.78, for which it had not been paid (R. 77). This amount is the same amount as that claimed to be due and owing to the appellant under its contract with Reeder (R. 4-5).

It is appellee's contention that, for the foregoing reasons, this case is not similar to the *Johnson* case but rather is similar to those cases which involve the supplying of materials for purposes of correcting defects which have been found after an inspection of the project. Therefore, as the *Johnson* court said, *supra*, this type of case is readily distinguishable, both in fact and principle, from the *Johnson* case.



The case of *United States of America for the Use and Benefit of Barney Austin v. Western Electric Co., et al.*, 337 F. 2d 568 (9th Cir., 1964), as cited by the appellant on pages 14-15 of its brief, is a correct summation of both the issues and principles therein involved. But, as appellant's quote shows, that case involved a material issue of fact because the complaint was filed on December 7, 1961 and, if no work was performed on December 7, 1960 or after, the complaint would have to, as a matter of law, be held to be not timely. The record was barren, on this material issue, of whether or not work was performed after December 6, 1960. In the instant case, there is no issue of fact as to when various furnishings of material took place. By October 31, 1963 the appellant had supplied all of the materials to the project for which it is making a claim (R. 77, 4-5). On March 23, 1964 Commercial shipped replacement materials to Shiff, C.O.D. and pursuant to a direct purchase order from Shiff, for which Commercial was paid by a certified check from Shiff (R. 111, 80-82). Appellee contends that what is involved here is not an issue of material fact, but rather an issue of law. This issue of law is: Given the facts surrounding the March 23, 1964 shipment from Commercial, as presented by the affidavits, was this a furnishing by the appellant?

Finally, in the case of *P. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company*, 297 F. 2d 337 (10th Cir., 1961), cited on pages 15-16 of the appellant's brief, the court said after the quote set forth on page 16 of appellant's brief:

"Scholes earnestly contends, however, that this delivery was a special order for its own account,

and that there was no competent evidence to support the trial court's conclusion that the order was placed pursuant to the Hardeman—Lock Joint contract.”

“Viewing these facts and the inferences fairly and reasonably to be drawn therefrom in the light most favorable to the appellant, we cannot say that it was clearly erroneous for the trial court to conclude that Lock Joint's delivery of the 198 feet of pipe was made pursuant to its contract with Hardeman and not pursuant to a special contractual relationship with Scholes.” 297 F. 2d 337, 339.

This reasoning of the *Scholes* court is also very apropos to the instant case because the affidavits, as previously shown by the appellee, clearly support the District Court's conclusion that the facts do not show that the March 23, 1964 shipment was pursuant to the Reeder-Floating Floors contract—but was rather pursuant to a special contract between Shiff and Commercial. Appellee contends that because the facts show that: (1) nowhere in the record does the appellant show that it had undertaken a contractual obligation to pay for the replacement panels (R. 114); (2) the March 23, 1964 shipment was made pursuant to a direct purchase order from Shiff to Commercial (R. 111), was made on C.O.D. terms (R. 80) and was paid for by a certified check from Shiff to Commercial (R. 82), the only reasonable conclusion which can be drawn from the record is that a special contract existed between Shiff and Commercial and for this reason the holding of the *Scholes* case is not applicable to the case at bar.

Appellee contends that, if we assume that the March 23, 1964 shipment was a furnishing by the ap-

pellant, the principle announced in *United States for Use of McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 188 Fed. Supp. 381 (D.C. Pa., 1960) is applicable.

“Under ninety day notice provisions of this section (270b), where last labor was performed and last supplies were furnished by third subcontractor for work on signal corps depot during early part of 1954, although third subcontractor corrected errors such as missing bolts and failure to close holes without charge in June, 1955, notice by third subcontractor to prime contractor by registered mail in June 1955 demanding payment balance due was not timely, and third subcontractor could not recover prime contractor’s payment bond.”

In the instant case, the last materials for work on the project were furnished by the appellant by October 31, 1963 (R. 77). Even if we assume that the appellant furnished some replacement panels in March, 1964, this furnishing was in the nature of repairs or correction of “errors” and the notice of June 12, 1964 was not timely.

Thus, it is the appellee’s final argument that even if this court finds that the record shows that the appellant furnished materials to Shiff on March 23, 1964, or at the very least there is an issue of fact as to said furnishing, the appellant is still not entitled to recover on the payment bond because it has failed to satisfy a procedural requirement, to wit, the notice of June 12, 1964 was not within ninety days from the date when the appellant last furnished materials for which its claim is being made. Appellant is claiming only for those materials furnished, at the very latest, on October

31, 1963 (R. 77, 4-5). And this case, being factually dissimilar, is not within the rule of *United States v. Gunnar I. Johnson & Son, Inc.*, *supra*.

### III.

Even though "the Miller Act is highly remedial in character and is entitled to a liberal construction and application . . .", *United States v. Dickstein*, 157 Fed. Supp. 126 (D.C.), it stands to reason that a liberal construction and application of that Act, to a given set of facts, can only take place after it has been clearly shown that a party claiming the benefit of that Act is entitled to claim such a benefit.

As the appellee has shown, by its foregoing authorities and analysis of the affidavits, the appellant had not made a last furnishing of materials on March 23, 1964, nor is the appellant making any claim for materials furnished after October 31, 1963 (R. 77, 4-5). Therefore, because the notice of June 12, 1964 was not within ninety days after the last furnishing for which the appellant's claim is made, the appellant's notice was not timely. Because the appellant's notice was not timely, the strict condition precedent to the existence of any right to sue on the bond had not been satisfied. *United States for Use and Benefit of American Radiator & Standard Sanitary Corporation v. North-Western Engineering Co., et al.*, 122 F. 2d 600 (8th Cir., 1941); *United States for the Use and Benefit of Soda v. Montgomery, et al.*, 253 F. 2d 509 (3d Cir., 1958). And, because there is no existence, in the appellant, of any rights under the Miller Act, it cannot be liberally construed or applied to the instant case as appellants contend.

Furthermore, the liberal construction and application to which the court in *United States v. Endebrock-White Company*, 275 F. 2d 57 (4th Cir., 1960) was referring was not with regard to the satisfaction of the procedural requirements of timely notice and commencement of an action, but were rather with regard to the burden of proof required to succeed in a Miller Act suit.

“We hold that, in order to recover under the Miller Act, it is not required of the materialman that he prove that his materials were ‘actually used’ in the prosecution of the work of the prime contract, but only that in good faith he reasonably believed that the materials were so intended.” 257 F. 2d 57, 60.

And, quoting from *United States v. Dickstein, supra*, the court said:

“The Miller Act is highly remedial in character and is entitled to a liberal construction and application in order properly to effectuate the congressional intent to protect those who furnish labor or materials for public works.” (Cites omitted). “In accord with this policy, and in view of the reasons discussed above, it is the opinion of this court that as against the prime contractor a materialman may recover under the Miller Act where he has sold and delivered material to the subcontractor in good faith and under the reasonable belief that it was intended for ultimate use under the prime contract. Neither delivery of the material to the prime contract job site nor actual incorporation of the material into the work is required.” 257 F. 2d 57, 60.



As has been previously shown, it was Commercial, and not the appellant, who sold the replacement panels to Shiff pursuant to a direct purchase order and on terms of C.O.D., which were complied with by Shiff.

### CONCLUSION.

The judgment of the District Court should be affirmed for the reasons that the genuine material facts, as presented by the various affidavits, are undisputed and, from these undisputed facts, as a matter of law, the appellant is not entitled to any relief under the Miller Act because its notice of June 12, 1964 has failed to satisfy the condition precedent—of timeliness—as set forth in Section 270b.

SIMON & LEANSE,

By SCOTT SIMON,

*Attorneys for Appellee.*

### **Certificate of Counsel.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SCOTT SIMON



No. 21253  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

UNITED STATES OF AMERICA for the use and benefit of  
FLOATING FLOORS, INC., a corporation,

*Appellant,*

*vs.*

FEDERAL INSURANCE COMPANY, a corporation,

*Appellee.*

---

On Appeal From the Judgment of the District Court of the  
United States, Southern District of California, Central  
Division.

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**APPELLANT'S REPLY BRIEF.**

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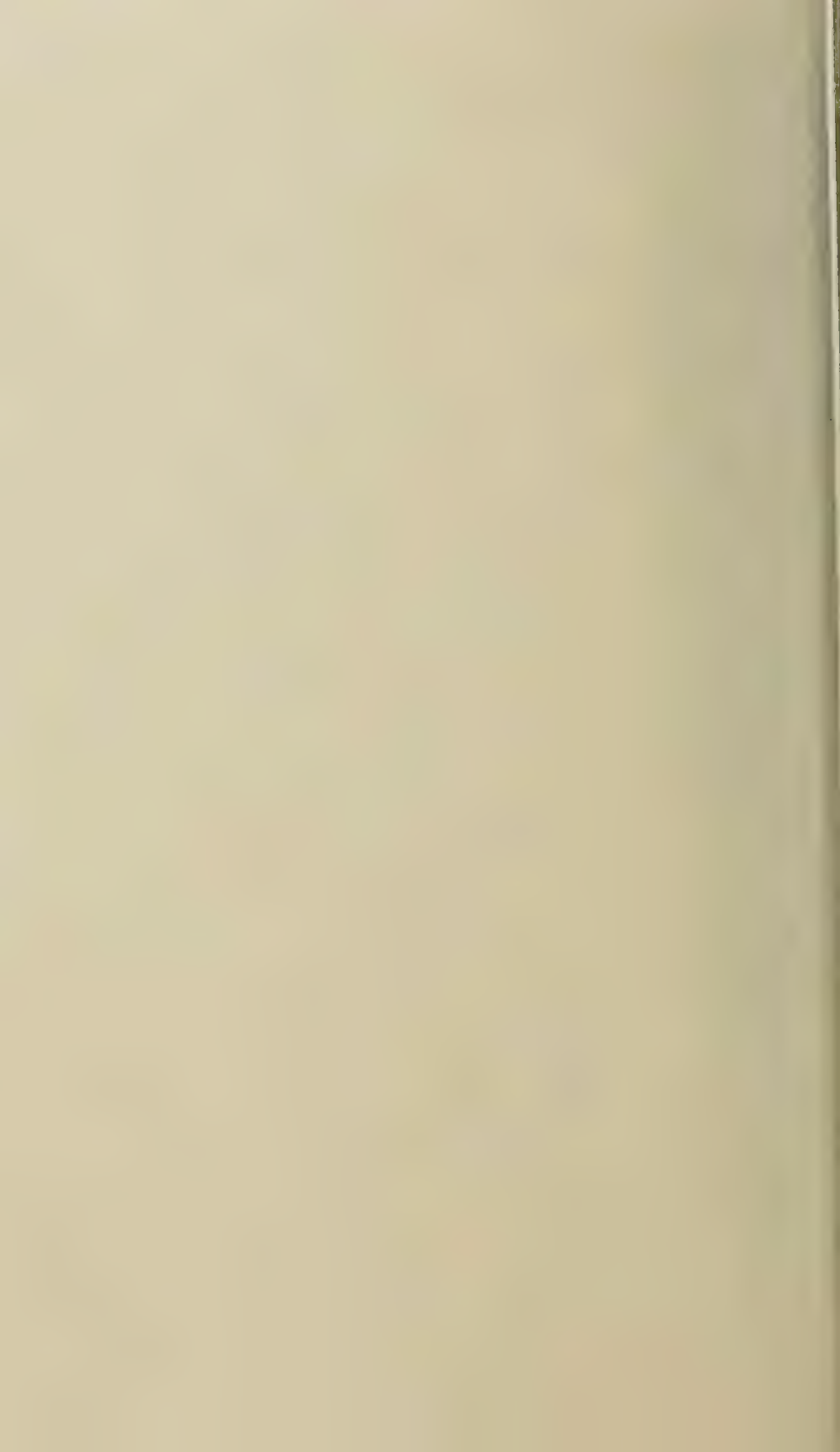
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**FEB 2 1967**

**WM. B. LUCK, CLERK**

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**FEB 15 1967**





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No. 21253

IN THE

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UNITED STATES OF AMERICA for the use and benefit of  
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On Appeal From the Judgment of the District Court of the  
United States, Southern District of California, Central  
Division.

---

**APPELLANT'S REPLY BRIEF.**

---

**I.**

**Whether Appellant Filed Its Suit Within One Year  
From the Last Furnishing of Material Is Not  
an Issue.**

Although Appellee's first motion for summary judgment mentioned the suit limitation period set forth in Section 270b(b) of Title 40 U.S.C., the court did not consider this matter, and the Appellee's second motion for summary judgment did not mention it. Consequently, any discussion of the one year suit period is not pertinent to the questions presented in this appeal. The only issue involved is that of TIMELY NOTICE.

II.

**There Is a Very Real Dispute as to the Date  
Appellant Last Furnished Material.**

While Appellee states on page 4 of its brief that there is no dispute as to the fact that no later than October 31, 1963 the Appellant had furnished all required materials to the project, there is nothing in the affidavits filed by the Appellant which supports the claim of Appellee that the last day of delivery was October 31, 1963. In fact, there seems to be a conflict in the affidavits of Appellee on this matter. Mr. Preger says in his first affidavit that no flooring was delivered to the job site by either L. D. Reeder Company or Floating Floors after July 31, 1963. [R. 23.] In his second affidavit, he states that no flooring was delivered to the job site by either L. D. Reeder Company or Floating Floors after April 18, 1963. [R. 73.] However, in the Memorandum of Points and Authorities accompanying both the first and second motions for summary judgment the date mentioned is December 31, 1963. [R. 19, 69.] Of course, if the Appellee adopts the latter date, December 31, 1963, as the date material was last supplied by Appellant, then the letter dated March 27, 1964 which was attached as Exhibit "B" to the second affidavit of Preger, at page 77 of the Record, and as Exhibit "F" to the first affidavit of Preger, set forth at page 33 of the Record, and which was admittedly received by Shiff, would be adequate notice to Shiff within 90 days from this furnishing.

III.

**Appellee Has Overlooked the Relationship Between Commercial and Appellant.**

*United States of America for the use of Bernard J. Weithman and Charles M. Weithman, a partnership dba Weithman Masonry and Const. v. The Buckeye Union Casualty Company*, 207 Fed. Supp. 552 (U.S.D.C.—Ohio 1962) is plainly inapplicable to the present situation. In *Weithman*, it appeared, as Appellee states on page 6 of its brief, that the repair work was done by a third party—Miller—under an independent service contract. Clearly that is not the situation in the present case. Shiff itself acknowledges that the original materials were secured by Appellant from Commercial. It is Appellant's contention in this appeal that the affidavits filed by it establish that the replacement panels, being manufactured by Commercial for Appellant were the property of Appellant when shipped by Commercial to Shiff. Therefore, there was no independent furnishing or performance by Commercial, as was the situation existing in *Weithman*. Appellee overlooks the fact that Appellant also received an invoice for the replacement panels.

Appellee erroneously concludes that there was no contract existing between Commercial and Appellant for the furnishing of the replacement panels as of February 20, 1964. While it is true that Commercial stated that it would not furnish the replacement panels at its own expense, if there had been misuse or improper installation, the fact remains that the replacement panels would



in any event be furnished to Appellant, who was the party with whom Commercial was dealing. There are no facts which support Appellee's statement on page 10 of its brief that "The manufacturing of these panels was for Commercial's inventory and not for the Appellant. . . ." The primary fact overlooked by the Appellee is that the affidavits filed by the Appellant show that the replacement panels were manufactured for the Appellant's use and were its property at the date of shipment.

Appellee's analysis of *United States for the use and benefit of P. A. Bourquin and Co., Inc. v. Chester Co., Inc. et al.*, 104 F. 2d 648 (2d Cir. 1939) fails, for it does not recognize 1. Appellant received an invoice for the replacement panels as well as the previous material. 2. If Commercial had not been paid directly by Shiff, it would have looked to Appellant, to whom the materials were supplied.

There is, of course, a dispute as to whether Appellant refused to ship the replacement panels. In his affidavit, Mr. Beere stated, regarding his March 17, 1964 conversation with Shiff, "I categorically deny that I, or anyone else representing Floating Floors, at any time refused to furnish the replacement panels. I did tell him that we were reluctant to release the replacement panels until we had clarified Reeder's status so we could determine how we were to be paid, not only for the original parts, but the replacement parts as well." [R. 103.] Appellant submits that withholding furnishing until such time as Reeder's status had been clarified does not amount to an unqualified refusal, as Appellee would have the court believe.

IV.

**Appellee Has Erroneously Equated the Furnishing of the Replacement Panels With Mere Repairs.**

Appellee attempts to distinguish *United States v. Gunnar I. Johnson and Son, Inc.*, 310 F. 2d 889 (8th Cir. 1962) unsuccessfully from the present situation. In both the cited case and the present case the facts presented show that the furnishing of additional material constituted a completion of performance of the contract, rather than a mere repair.

The only reason why Appellant is not making a claim for the value of the replacement materials is because Commercial, its supplier, has been paid for these items. However, this does not alter the fact that the replacement panels belonged to Appellant and were furnished by Appellant. If a determination had been made that Commercial was not responsible for the replacement of the panels, and Commercial had thus charged for the replacement panels, as it did, then Commercial would have looked to Appellant. Under those circumstances, Appellant would have paid Commercial and attempted to collect the balance from Shiff or Reeder. What possible difference can it make that this circuitous route was not followed?

*United States for use of McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 188 Fed. Supp. 381 (U.S.D.C. Pa. 1960) obviously does not involve the same situation as the one at hand. In that case, the court, *after a trial*, held that the additional labor performed was not part of the original performance of the contract. Appellant contends that the affidavits filed by it sufficiently present a genuine issue of material fact as to whether the furnishing of the re-

placement materials constituted a completion of Appellant's contract.

### Conclusion.

For the reasons stated in Appellant's Opening Brief and on the basis of the comments above, it is respectfully submitted that the District Court erred in concluding that there was not a genuine issue of material fact concerning whether the Appellant in fact last furnished material for the job on March 31, 1964 and concerning whether the notice given on June 12, 1964 was timely and, therefore, the judgment below should be reversed and the case tried on its merits.

DILLAVOU & COX,

By MICHAEL M. WEEKES,

*Attorneys for Appellant.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL M. WEEKES





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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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VELJKO STANISIC,

*Petitioner,*

v.

UNITED STATES IMMIGRATION AND  
NATURALIZATION SERVICE and ALFRED  
J. URBANO, District Director, United States  
Immigration and Naturalization Service,

*Respondents.*

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**PETITIONER'S OPENING BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

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FILED

NOV 22 1966

WM B LUCK, CLERK

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FEB 15 1967



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**United States**  
**COURT OF APPEALS**  
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v.

UNITED STATES IMMIGRATION AND  
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J. URBANO, District Director, United States  
Immigration and Naturalization Service,

*Respondents.*

---

**PETITIONER'S OPENING BRIEF**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**JURISDICTIONAL STATEMENT**

This matter was initiated by the order of Alfred J. Urbano, District Director of U. S. Immigration and Naturalization Service on June 21, 1966 directing that the petitioner appear at his office at Noon on June 24, 1966 for deportation to Yugoslavia. This order was based upon his alleged excludability at the



time of the alien's entry under Sec. 252 (b) of Immigration and Naturalization Act and proceedings under 8 CFR 253.1 (e). A Petition for Parole (R. 34-35) was promptly filed June 22, 1966 requesting a stay of execution and a hearing before a special inquiry officer of the Immigration Service, and in the alternative and in the event of denial of his petition that the petitioner might depart voluntarily from the United States at his own expense. The Petition for Parole was summarily denied (R. 32-33) on June 23, 1966 without hearing, whereupon on June 23, 1966 the petitioner filed in the U. S. District Court for the District of Oregon a complaint (R. 1-4) seeking a restraining order and supplemented such complaint with an order to show cause (R. 7-8), both of which were duly served upon the U. S. Immigration and Naturalization Service and Alfred J. Urbano, District Director, in civil action file No. 66-333. On June 24 the respondents, appearing by the U. S. Attorney for the District of Oregon filed an answer (R. 9-10) praying that the petitioner's complaint be dismissed. A brief hearing was held early on June 24, 1966 before the Honorable John F. Kilkenny, District Judge, wherein petitioner's complaint was denied (R. 20). Thereupon the petitioner immediately filed a notice of appeal (R. 21) to this honorable court.

This case comes before the court under Public Law 89-236, Sec. 11 (f), 79 Stat. 918, enacted October 3, 1965, and which amended 8 USC 1253 (h). Jurisdiction of this court rests in equity.

### STATEMENT OF THE CASE

The petitioner is an alien and a citizen of Yugoslavia who served as a radio operator on a Yugoslavian flag vessel which docked at Coos Bay, Oregon on or about December 23, 1964. The petitioner was given a landing permit as a D-1 crewman and came ashore numerous times. On or about January 6, 1965 he presented himself to the Immigration Service and sought asylum by a petition for parole under the provisions of 8 USC 1253 (h) as it then existed, providing for asylum in the case of physical persecution. The District Director treated the matter as a case coming under 8 USC 1282 (b) as a *mala fide* seaman, revoking his landing permit, and without hearing ordered him removed to his vessel. Thereupon the petitioner obtained counsel who applied to the United States District Court for the District of Oregon, Case No. 65-10. for a hearing before a special inquiry officer under 8 USC Sec. 1252 (b) (R. 39-43), but on January 18, 1965 the court (R. 49) ordered the matter referred to the defendant District Director for the presentation of evidence in accordance with 8 CFR 253.1 (e) on the question of physical persecution. The following day, January 19, 1965, the petitioner did present evidence to the defendant District Director (see the Secret Testimony), and on January 26, 1965 the District Director denied petitioner's application for parole. The petitioner then filed a Motion for Review by the Court because of expressed and open bias of the District Director (R. 54). The District Director

moved for summary judgment, which the Court granted on July 20, 1965 (R. 86-95).

The petitioner's expulsion was stayed pending an application to Congress for a private bill. In the meantime the statute was changed on October 3, 1965 no longer to require physical persecution as a ground for asylum, but to allow in lieu thereof "persecution on account of race, religion, or political opinion." When the Congressional application was turned down in June, 1966 the defendant District Director on June 21, 1966 ordered the petitioner to appear about 70 hours later on June 24th for deportation to Yugoslavia by airplane. A Petition for Parole (R. 34-35) was filed June 22, 1966 requesting:

1. A stay of deportation to Yugoslavia on the basis of anticipated persecution on account of religious and political opinion, and on account of pending litigation in Lane County, Oregon;
2. A hearing before a Special Hearing Officer of the Immigration Service; and,
3. In the alternative, in the event of denial of the petition, leave to depart voluntarily from the United States at his own expense.

This petition was denied by the District Director without hearing on the new issues (R. 32-33). The same day, June 23, 1966, the petitioner filed in the United States District Court for the District of Oregon a complaint, Case No. 66-333 (R. 1-3) seeking a restraining order and relief under 8 USC, Sec. 1253 (h), on the ground of persecution on account of re-

ligion or political opinion, and such other and further relief as might be appropriate. A hearing was held early the next morning and the Court denied the relief sought on the ground of *res adjudicata* in Case No. 65-10 without considering the question presented to it (R. 20).

With the shifting of asylum goal posts from the requirement of physical persecution to those of persecution on account of religion or political opinion, the issues before this Court are:

1. Whether the decision in Case No. 65-10 is *res adjudicata* in Case No. 66-333.
2. Whether a D-1 crewman asylum and whose ship has left the territorial waters of the United States may be expelled only in accordance with normal deportation procedures, including a full and fair hearing before a Special Inquiry Officer and with right of appeal.
3. Whether, in the alternative, a D-1 crewman whose ship has left the United States should be given a reasonable time to complete arrangements to leave on a voluntary basis.

### SUMMARY OF ARGUMENT

An alien crewman granted a landing permit and then pleading for asylum from persecution may be expelled after his ship has left United States waters only in accordance with normal deportation procedures with full protection of the Constitution and its

Amendments. He is not to be treated as a ship-jumper, and therefore subject to peremptory exclusion. The summary hearing before the defendant District Director, without appeal, instead of the normal Special Inquiry Officer with due process and the safeguards of appeal, deprived the petitioner of his Constitutional rights.

While the petitioner was seeking a remedy in Congress the statutory goal posts were shifted by the amendment of 8 USC 1253 (h) so as not to require any longer proof solely of physical persecution; the goal posts became on October 3, 1965 "persecution on account of race, religion, or political opinion." The amendment raised a new right which could not have been adjudicated in Case No. 65-10. The right did not exist until October 3, 1965, months after the judgment in that case. The instant case, Case No. 66-333, is a fresh approach based on newly granted statutory rights.

In the light of the new standards, the secret testimony taken before Mr. William L. Pattillo, Deputy District Director of the Immigration and Naturalization Service, on January 19, 1965 yields ample evidence of highly probable political, religious, physical and family persecution awaiting this petitioner if he is returned to Yugoslavia (Secret Testimony, pp. 15-60, inc.). This secret testimony was reviewed *in camera* by the Honorable William L. East, District Judge in Case No. 65-10, but only as it dealt with "physical persecution" could it be relevant under the then ex-



isting statute. It is now relevant in all respects in the case before this Court to show the need as well as right of the petitioner for a full and normal deportation hearing before an impartial Special Inquiry Officer and with all the rights conferred by the Constitution, including the right of an appeal to the Board of Immigration Appeals and to the courts, if necessary. So far this has been denied to the petitioner.

Only as a last consideration, and if all remedies are denied to him, the petitioner, whose ship has long since left the waters of the United States and who has sought asylum from Yugoslavia, should be allowed a reasonable time to make arrangements to leave on a voluntary basis for some other haven free from persecution. The safety and best interests of the United States are not impaired by letting him find his own haven. Neither does it comport with decency or fair play to send a man against his wishes back to certain and cruel doom in a Communist-controlled country.

### **SPECIFICATION OF ERRORS**

1. The amendment of 8 USC 1253 (h), enacted October 3, 1965, liberalized the law and afforded to the petitioner a new right not existing theretofore, and denial thereof to the petitioner was error.

2. The court erred in not ordering procedural due process including a full and fair hearing as a matter of constitutional right under the Fifth Amend-

ment to a D-1 crewman seeking asylum and whose ship has left the United States.

3. The court erred in not ordering normal deportation procedures, including notice of charges, full and fair hearing by a Special Inquiry Officer, and an opportunity of appeal to the Board of Immigration Appeals to a D-1 crewman seeking asylum and whose ship has left the United States.

4. The court erred in not ordering the defendants to consider the prospect of harassment and prolonged imprisonment for violating exit restrictions as a factor to be considered under "persecution."

5. The court erred in not ordering the defendants to grant any full and real hearing on the facts and to hear new facts regarding religious and political persecution.

6. The court erred in not permitting in the alternative (all remedies unavailing) a D-1 crewman seeking asylum and whose ship has left the United States to have a reasonable time to complete arrangements to leave on a voluntary basis.

## **ARGUMENT**

### **I**

#### **Goal Post Moved**

The amendment of 8 USC 1253 (h), enacted October 3, 1965, liberalized the law and afforded to the petitioner a new right not existing theretofore, and denial thereof to the petitioner was error.

So elementary a point need hardly be argued. The 1952 statute authorized the Attorney General to withhold deportation of an alien to a country where the alien would be subject to "physical persecution." It was only under this statute that the petitioner's Case No. 65-10 could be heard. Congress on October 3, 1965 enacted an amendment so that 8 USC 1253 (h) now provides:

"(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subjected to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Subsequent thereto, and on June 22, 1966, the petitioner filed with the District Director of the Immigration and Naturalization Service his Petition for Parole (R. 34-35), under the new statute seeking stay of deportation on the basis of anticipated persecution on account of religious and political opinion. No hearing was held, and within hours it was denied by the District Director (R. 32-33) on the ground that the decision in Case No. 65-10 was *res adjudicata* here.

In *Soric v. INS*, 384 U.S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1283, decided December 1, 1965, shortly after the enactment of the amendment to 8 USC 1253 (h), the court remanded the case to the Immigration and Naturalization Service "for consideration of the claims for relief as authorized by the 1965 amendments to the Immigration and Nationality Act." A similar result should follow in the case at bar.

A new right has been created which cannot be denied to petitioner.

## II

### Protection of Constitution

The court erred in not ordering procedural due process including a full and fair hearing as a matter of constitutional right under the Fifth Amendment to a D-1 crewman seeking asylum and whose ship has left the United States.

An alien D-1 crewman seeking asylum is not in the same category as a D-1 crewman simply jumping ship. *Szlaimer v. Esperdy*, 188 F. Supp. 491 (SDNY, 1960). He is entitled to procedural due process. *Sovich v. Esperdy*, 319 F.2d 21 (C.A. 2, 1963). This includes review by the courts of the administrative determination of "persecution on account of race, religion, or political opinion." *Dunat v. Hurney*, 297 F.2d 744 (C.A. 3, 1961). The refusal of the defendant District Director to give the petitioner a full and fair hearing, or any hearing at all for that matter, before a Special Inquiry Officer makes a mockery of due process. It is shabby procedure to dispose of the question of asylum by a hearing within a matter of hours before the man who is at one and the same time arresting officer, judge, jury, and executioner. Such practice in other lands is roundly condemned, and rightly so. The District Director and the court below have lost sight of the humanitarian concern of Congress and the rights conferred by the Constitution even on an alien crewman.

Because of the severe consequences of deportation, the Supreme Court has declared that deportation statutes must be very narrowly construed i.e., liberally in favor of the alien. In *Rosenberg v. Fleuti*, 374 U.S. 449, 10 L. Ed. 2d 1000, 83 S. Ct. 1804 (1963), at 374 U.S. 458 the Court said:

“The most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of Di Pasquale and Delagadillo themselves, beginning with the recognition that the ‘interests at stake’ for the resident alien are ‘momentous’, . . . and that ‘[t]he stakes are indeed high and momentous for the alien who has acquired his residence here’, . . . This general premise of the two decisions impelled the more general conclusion that ‘it is . . . important that the continued enjoyment of . . . [our] hospitality once granted, shall not be subject to meaningless and irrational hazards.’ . . . [I]t is difficult to conceive that Congress meant its approval of the liberalization wrought by Di Pasquale and Delgadillo to be interpreted mechanistically to apply only to cases presenting factual situations identical to what was involved in those two decisions.”

Here the petitioner after he had been ashore in Coos Bay, Oregon, many times after December 23, 1964, frankly sought asylum by presenting himself to the Immigration and Naturalization Service. He did not hide or refuse to cooperate. Neither did he obtain the landing permit by fraud. But with the memory of 30 close relatives killed by the Communists (Secret Testimony, p. 26) and the oppressive atmosphere in Yugoslavia as well as the high probability



of unusual and vicious punishment for seeking illegal exit once more (*ibid.*, at pp. 29, 34) this man's life and limb are now seriously in jeopardy. Before he is finally consigned to his tormentors he should be given every constitutional guaranty of procedural due process.

Furthermore, the purpose in providing for a summary hearing before District Director is to enable the ship to proceed with its full crew from our shores. But the SS Sumadija has long since left these shores and the need for haste no longer exists. With the reason gone, the procedure should follow our time-honored tradition of fair play with every protection of the Constitution.

### III

#### **Normal Deportation Procedure**

The court erred in not ordering normal deportation procedures, including notice of charges, full and fair hearing by a Special Inquiry Officer, and an opportunity of appeal to the Board of Immigration Appeals to a D-1 crewman seeking asylum and whose ship has left the United States.

In "Immigration Law and Procedure," by Gordon and Rosenfield, the rule is set forth at page 633:

" . . . D-1 crewmen whose vessel has left, may be expelled in accordance with the normal deportation procedures . . . . This means that they are entitled to notice of the charges, a full and fair hearing, and opportunity for appeal to the Board of Immigration Appeals, in the event their de-

portation is ordered by a Special Inquiry Officer. And in such deportation proceedings they may apply for any discretionary remedies that may be applicable, such as voluntary departure, suspension of deportation, pre-examination, stay of deportation on ground of anticipated physical persecution or any other appropriate dispensation . . .”

Petitioner’s ship has already left and the need for summary deportation no longer exists. This was the result reached in the *Matter of M*, 5 I.N. 127 (1953). A similar result should follow here.

#### IV

##### **Harassment as Persecution**

The court erred in not ordering the defendants to consider the prospect of harassment and prolonged imprisonment for violating exit restrictions as a factor to be considered under “persecution.”

In *Sovich v. Esperdy*, 319 F.2d 21 (C.A. 2, 1963), at p. 28, the court said:

“ . . . It would be naive to suppose, therefore, that punishment for illegal departure, under these circumstances, is not politically motivated, nor does not constitute punishment ‘because of . . . political opinion’.”

And again at p. 29:

“ . . . We are unwilling to believe, however, that Congress has precluded from relief under § 243 (h) an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictator-

ship. Such construction of the statute would attribute to Congress an insensibility to human suffering wholly inconsistent with our national history.

“We hold, therefore, that the Attorney General, through his delegate, erroneously construed the limits of his discretion in ruling that imprisonment for illegal departure may never constitute ‘physical persecution’ within the purview of § 243 (h).”

Judge Medina, concurring, added at p. 30:

“... I do not see how the rulings of the Special Inquiry Officer and the Regional Commissioner can mean anything other than that imprisonment for illegal departure may never constitute ‘physical persecution.’ If this is so, the construction thus given to the statute is not only utterly repugnant to our national traditions and history, it is also patently inconsistent with the intention of the Congress in enacting Section 243 (d). A decision based upon such misreading of the law must necessarily be capricious and arbitrary.”

The issue before the District Director on January 19, 1965, under the statute then in force, was solely “physical persecution.” Even so the petitioner testified (Secret Testimony, p. 34) that he would be punished more severely for leaving the ship because he was anti-Communist and believed in God and was suspected of being a spy for the United States. The District Director chose to ignore this testimony in his summary determination that there was no evidence of persecution.

No hearing whatever was held in June, 1966 on the Petition for Parole. There was a complete disregard of the law and the facts.

This court should require the Immigration and Naturalization Service to receive full and complete testimony on the entire issue of religious and political persecution before a Special Inquiry Officer, including evidence of harassment and prolonged imprisonment for violating exit restrictions. Anything less would be a sham.

## V

### **New Facts**

The court erred in not ordering the defendants to grant any full and real hearing on the facts and to hear new facts regarding religious and political persecution.

With the shifting of the goal-posts (8 USC 1253 (h) as amended October 3, 1965) the petitioner is entitled to present evidence of persecution because of religion or political opinion. No hearing on this issue has ever been held in this case.

But more. He should have a full and real hearing, not just before a District Director who has already been charged with bias and prejudice and a closed mind even before any testimony was given on January 19, 1965 (R. 75-76). It should be a hearing at which the petitioner may present new facts regarding religious and political persecution. And the hearing should be before a Special Inquiry Officer. "Immigra-

tion Law and Procedure" by Gordon and Rosenfield, p. 633.

## VI

### Voluntary Departure

The court erred in not permitting in the alternative, and all remedies unavailing, a D-1 crewman seeking asylum and whose ship has left the United States to have a reasonable time to complete arrangements to leave on a voluntary basis.

The petitioner faces a hard fate if he is compelled to return to Yugoslavia, and the United States gains nothing by subjecting him to such a future. The safety and best interests of the United States are not impaired by letting him find his own haven.

In *Chang v. INS*, 358 F.2d 699 (C.A. 3, 1966) such an order was upheld, together with the alternative that if he failed to depart the INS could designate a country.

In the *Matter of F*, 9 I.N. 333 (1961), a Yugoslav seaman trying to ship out to Trinidad, with distinct probability of success, was given a reasonable time to complete arrangements. In that case it was indicated that this would take at least 60 days.

Therefore, and only as a last resort if petitioner's appeal should fail, he should be allowed time to find a hospitable land to which to go.



### CONCLUSION

Petitioner contends that under the clear language of 8 USC 1253 (h) as amended on October 3, 1965 new statutory rights have been conferred which have never been adjudicated and on which he is entitled to be heard under the Constitution in a full and fair hearing before a Special Inquiry Officer of the Immigration and Naturalization Service according to normal deportation procedures.

In the alternative, and only if all other remedies are unavailing, he should be allowed a reasonable time to leave on a voluntary basis.

Respectfully submitted,

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DON EVA,  
BARTLETT F. COLE, SR.,  
Attorneys for Petitioner

### CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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No. 21272

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United States  
Court of Appeals  
for the Ninth Circuit

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VELJKO STANISIC,

*Appellant,*

vs.

U.S. IMMIGRATION & NATURALIZATION  
SERVICE, and ALFRED J. URBANO, District  
Director, United States Immigration  
and Naturalization Service

*Appellees.*

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*On Appeal from the judgment of the United States  
District Court for the District of Oregon*

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**BRIEF OF APPELLEE**

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SIDNEY I. LEZAK,  
*United States Attorney.  
District of Oregon*

NORMAN SEPENUK  
*Assistant United States Attorney.*

FILED

JAN - 1967

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Immigration Law and Procedure, Gordon & Rosenfield

United States  
Court of Appeals  
for the Ninth Circuit

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VELJKO STANISIC,

*Appellant,*

vs.

U.S. IMMIGRATION & NATURALIZATION  
SERVICE, and ALFRED J. URBANO, District  
Director, United States Immigration  
and Naturalization Service

*Appellees.*

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BRIEF OF APPELLEE

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COUNTER-STATEMENT OF THE CASE

The facts, as found by the Honorable William G. East in his Opinion below, may be briefly summarized as follows: Appellant Stanisic (Stanisic), a national of Yugoslavia, was a member of the crew of the M-V SUMADIJA, of Yugoslavian registry, on January 4, 1965 (R.86)<sup>1</sup>

During the night of January 4, 1965, while the M-V SUMADIJA was in the port of Coos Bay, Ore-

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<sup>1</sup> Record references are to the two volume District Court Clerk's Transcript of Record

gon, Stanisic, who held an entry permit as a visiting seaman issued by the Appellee Naturalization Service, departed the ship, with the intention of remaining in the United States (R. 87).

Appellee Alfred J. Urbano (Urbano), District Director of Immigration and Naturalization Service in Oregon, when advised of the desertion, revoked Stanisic's entry permit. 8 U.S.C. § 1282(b) (R.87).

On January 7, 1965, Stanisic sought of Urbano parole to the United States pursuant to the provisions of 8 U.S.C. § 1253(h) on the grounds that he was non-sympathetic to the averred Communist government of Yugoslavia, and should he return to Yugoslavia he would be subjected to physical persecution for his political beliefs (R. 87).

Urbano on January 7, 1965 caused Stanisic to be interrogated by personnel of his Portland office, and, based upon the record of such interrogation, found in the exercise of his discretion that Stanisic's grounds for parole were wanting, denied his application for parole and ordered him excluded and returned to his ship (R. 44-45, 87).

Stanisic then instituted a proceeding in the District Court seeking injunctive relief from Urbano's orders. Stanisic claimed that he had sufficient entry status to entitle him to a hearing before a special

inquiry officer, prescribed for regular deportation proceedings under 8 U.S.C. § 1252(b) (R. 41-48, 87). The District Court, while holding that Stanisic had no such right to a hearing before a special inquiry officer (R. 87-89), stayed the contemplated exclusion order and referred the matter back to Urbano for the purpose of holding an evidentiary hearing to receive such testimony and evidence which Stanisic desired to produce in support of his claim of physical persecution if returned to Yugoslavia (R. 89). On January 19 and 20, 1965, Urbano caused the evidentiary hearing to be held by William L. Pattillo (Pattillo), Deputy District Director for Oregon, and Stanisic called and interrogated all witnesses and produced all evidence of his choice (R. 89).<sup>2</sup>

Based upon the record of such hearing, Urbano, on January 25, 1965, in the exercise of his discretion, found that: (R.89)<sup>3</sup>

(a) The petitioner, upon his return to Yugoslavia, would probably be subjected to penalties provided by law for his voluntary desertion of his ship, and

(b) The petitioner had failed to prove his claim

<sup>2</sup> The record of these hearings are contained in a 62-page document which is part of the record on appeal.

<sup>3</sup> Urbano's findings are contained in a ten page document which is in the supplemental record on appeal (pp. 101-110).

of physical persecution for his political beliefs upon his return to Yugoslavia,

and accordingly denied the petition for parole. On January 27, 1965, Stanisic moved the District Court to review Urbano's decision and order of January 25, 1965, on the ground that the same was arbitrary, capricious, was not supported by the evidence, and that Urbano was biased against him (R. 50-52, 89).

Stanisic noticed the discovery depositions of Urbano and Patillo, and the Court denied Urbano's and Pattillo's request for relief from such discovery (R. 89). These depositions were taken on May 18, 1964, and the depositions, as well as the complete administrative files of the Immigration Service's Oregon office relating to Stanisic, were filed for review by the District Court *in camera* (R. 89-90).<sup>4</sup> Upon the basis of this record, and the record of the evidentiary hearing before Pattillo, Stanisic and Urbano each filed Motions for Summary Judgment in their respective favor (R. 89).

The District Court, after holding that it had jurisdiction to review the proceedings before Urbano (R. 90-93), denied Stanisic's claim for injunctive relief and granted the government's Motion for Summary Judgment as follows: (R. 93-96)

"I have reviewed the entire record as devel-

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<sup>4</sup> The depositions of Urbano and Pattillo are contained in the record on appeal.



oped and placed before Urbano upon the petitioners' claim for physical persecution for political belief if returned to Yugoslavia, and conclude that Urbano did not abuse his discretion in denying the applications for parole, nor are his findings and order lacking a foundation. Evidence substantiating the petitioners' claim of physical persecution for their political beliefs is conspicuous by its complete absence.

"The petitioners make no claim that Urbano's decision and order is illegal.

"I find the entire record before Urbano and this Court devoid of any evidence whatsoever that Urbano acted fraudulently, arbitrarily, or capriciously in his evaluation of the evidence before him.

"The petitioners have claimed Urbano was personally biased in denying their parole and that he should have been disqualified. The asserted bias is based in large part upon alleged facts known prior to the hearing. Under § 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a) (1964 ed.) disposition of allegations of bias is initially the agency's responsibility. The allegations are to be raised by 'the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification,' and 'the agency shall determine the matter as a part of the record and decision in the case.' (Emphasis supplied.) However, the petitioners raised the issue of personal bias for the first time in these proceedings following the evidentiary hearing, and under the provisions of § 1006(a), as usually applied, lost their opportunity to assert the question of bias. Davis, *Administrative Law Text* § 12.06 (1958). 'The issue of bias must be raised neither too soon nor too late.' *Ibid*. Nevertheless, the Court has examined the rec-

ord before it and finds the claims of bias groundless.

"The evidentiary record discloses that each of these petitioners enjoyed a good civilian and governmental status in his country at the time he departed on the voyage ultimately bringing him to the United States, in spite of his now-avowed anti-Communist political beliefs.

"What 'physical persecution,' if any, they will receive upon their return to their own country, will be due to their voluntary desertion of their ship and other voluntary acts and averments occurring since.

"These causes have aroused a great deal of public sympathy for the petitioners, all without full advice as to the facts and circumstances. Granted, the petitioners may be anti-Communist in their political beliefs, and in all probability would be good citizens of the United States; nevertheless, Congress has not seen fit to provide for lawful entry or permanent refuge in the United States (other than by established quotas for citizens of nations with Communist Governments) on the sole ground that those individuals are not sympathetic with that Communist Government. Neither Urbano nor this Court can make such legislation."<sup>5</sup>

No appeal was taken by Stanisc from this Order of the District Court.

Shortly thereafter, Stanisc's expulsion from the United States was stayed pending his application to

<sup>5</sup> References by Judge East to the "petitioners" (plural) include aside from Stanisc, one Veselin Vucinic, a Yugoslavian national who jumped ship with Stanisc, and who also applied for parole to this country.

Congress for a private bill to permit him to remain in this country (R. 14). The Senate Judiciary Committee did not approve the bill, and the matter was referred back to Urbano in June 1966 for appropriate action (R. 14). On June 21, 1966, Urbano ordered Stanisc to appear on June 24, 1966, for deportation to Yugoslavia (R. 14). Stanisc then filed a Petition for Parole (R. 34-35) on June 22, 1966, requesting:

- (1) A stay of deportation to Yugoslavia on the basis of anticipated persecution on account of religious and political opinion, and on account of pending litigation in an assault and battery case in Lane County, Oregon, in which Stanisc was the plaintiff;
- (2) A hearing before a special inquiry officer of the Immigration Service; and
- (3) In the alternative in the event of the denial of the petition thereafter to depart voluntarily from the United States at his own expense.

The petition alleged that Stanisc was entitled to such relief on the ground that Congress, on October 3, 1965, (some three months after Judge East's decision and order) amended 8 U.S.C. § 1253(h) so as no longer to require solely physical persecution as a ground for asylum, but to allow in lieu thereof "persecution on account of race, religion, or political opinion". (R. 34)

This petition was denied by Urbano on June 23, 1966 (R. 32-33). On that same day, Stanisic filed in the United States District Court a Complaint (R. 1-3) seeking an order restraining deportation and further relief under 8 U.S.C. § 1253(h) on the ground of persecution on account of religious and political opinion. The government opposed the request for relief (R. 9-10), and on June 24, 1966, the Honorable John F. Kilkenny entered Findings and Judgment in favor of the government as follows: (R. 20)

"The above cause having come on before the Court upon the petitioner's Motion to Restrain and petitioner appearing by G. Bernhard Fedde and the respondents appearing by Sidney I. Lezak, United States Attorney, and the Court having considered the record in Civil 65-10 in this Court between the same parties and the opinion of the Honorable William G. East filed in that case and arguments having been made, and

"It appearing from the entire record that there was substantial evidence in support of the findings and order of respondents, and being now fully advised,

"IT IS ORDERED, ADJUDGED and DECREED that petitioner's motion to restrain be, and the same is hereby, denied."

The present appeal is from the Order of Judge Kilkenny denying injunctive relief.

## ARGUMENT

Appellant's brief presents two major arguments: (1) That he is entitled to a full scale hearing before a special inquiry officer under Section 242(b) of the Immigration and Naturalization Act, 8 U.S.C. 1252(b), and (2) that he qualifies under the 1965 amendment to Section 243(h) of the Act, U.S.C. 1253(h), which permits a stay of deportation to an alien within the United States who—in the opinion of the Attorney General—would be subject to persecution on account of race, religion or political opinion. As was shown in the statement above and as discussed below, these issues were decided against appellant by Judge East in the first civil injunctive action instituted by him, and since no appeal was taken, the matter is clearly *res judicata* in the present proceeding. However, since appellant's brief—in our view—so fundamentally misconceives the provisions of the Immigration and Naturalization Act of 1952, we believe it may be helpful to the Court by way of background to set forth the statutory scheme and the Congressional purpose in enacting the alien crewmen laws and to show that these procedures were properly followed in this case.



**The procedure followed herein by the Immigration and Naturalization Service was proper and fully complied with the Immigration and Nationality Act of 1952 and the amendments thereto.**

### **A. THE STATUTORY SCHEME**

The central considerations raised by appellant's argument are whether the different treatment accorded alien crewmen on foreign vessels touching at United States seaports as distinguished from other aliens is in accordance with the provisions of the Immigration and Naturalization Act of 1952. Resolution of this issue depends on an analysis of the relevant statutory provisions and the Congressional purpose in enacting them. As we shall show, Congress has determined that the alien crewman presents a special problem which makes separate classification and special and summary treatment rational and not arbitrary as appellant charges in his brief.

Congress in enacting the Immigration and Nationality Act in 1952 recognized that one of the most serious abuses to be corrected in the enforcement of immigration laws concerned the alien who as a crewman was arriving in this country, intending to desert or to otherwise enter illegally. Report of the Committee on the Judiciary, 81st Congress, 2d Session, April 20, 1950, Report No. 1515, "The Immigration and Naturalization Systems of the United

States" included these remarks regarding seamen: (pp. 54-58):

*"c. Comment on practices and problems relating to alien seamen*

*"(1) Statement of the problems*

"The problems relating to seamen are largely created by those who desert their ships, remain here illegally beyond the time granted them to stay, and become lost in the general populace of the country. For a number of years, it has been generally recognized, both by Government officials and others, that the temporary 'shore leave' admission of alien seamen who remain illegally constitutes one of the most important loopholes in our whole system of restriction and control of the entry of aliens into the United States. The efforts to apprehend these alien seamen for deportation are encumbered by many technicalities invoked in behalf of the alien seamen and create conditions incident to enforcement of the laws which have troubled the authorities for many years . . .

"The complexity of the problem was described by an official of the Visa Division of the Department of State as follows:

'Seamen constitute one of our biggest problems we have today. If we could ever devise some way to control the movement of hundreds and thousands of seamen in and out of our ports every year and yet preserve to a maximum degree the national security of this country, I think we would have accomplished a great task. But you cannot do it—at least no way has so far been found—without seriously delaying shipping. You cannot hold up a vessel and go into the history and background of every person who happens to be signed on the crew list of the ves-

sel as a seaman. Some inspections must be made of those people but you cannot hold up shipping.’”

With this in mind, Congress in 1952 enacted a group of special provisions for crewmen to provide greater controls over them, and also to provide for the revocation of their permits and their speedy removal from the United States if, after being given shore leave, they were found to be not intending to depart with the vessel on which they arrived. These and other provisions relating solely to crewmen are contained in Chapter 6, Immigration and Nationality Act, which is entitled “Special Provisions Relating to Alien Crewmen” (Sections 251-260, Immigration and Nationality Act, 8 U.S.C. 1281-87). In enacting these laws, Congress had this to say: (United States Code, Congressional and Administrative News, Volume 2, 82nd Congress, 2nd Session, 1952, pp. 17, 21-22):

**“8. *ALIEN CREWMEN CONTROLS* (Ch. 6)**

“Chapter 6 of the bill brings together in one grouping the various provisions of existing law which impose special controls on the entry and departure of alien members of the crews of vessels and aircraft. Generally, the controls under existing law are brought forward with modifications which will insure that members of the crews of vessels or aircraft entering the ports or airports of the United States from foreign places will depart the United States, while at the same time permitting the crew members to land temporarily for such periods of time as is necessary to maintain normal operations in the con-

duct of foreign commerce. Where appropriate, the provisions are made applicable to crew members of aircraft on the same basis as they are applied to seamen.

“One significant change is that statutory provision is made for the granting of conditional permits to land temporarily similar to the present authorization provided by regulations. Section 252 provides that otherwise admissible alien crewmen may, in the discretion of an immigration officer and if the crewman agrees to accept the conditional permit, be permitted conditionally to land temporarily for not more than 29 days, which permission is revocable if the alien is found not to be a bona fide crewman or does not intend to depart on the vessel on which he arrived or some other vessel. Upon the revocation of such a conditional permit, an immigration officer is authorized to take the crewman into custody and require the master or commanding officer of the vessel or aircraft on which the crewman arrived, to detain such crewman on board, if practicable, and any expense involved in the deportation of the crewman from the United States shall be at the expense of the vessel or aircraft on which he arrived. The procedure set forth in section 242 of the bill is not applicable in the case of the removal of a crewman whose conditional permit to land temporarily has been revoked . . .”

To the same effect, see “Commentary on the Immigration and Nationality Act” by Walter M. Besterman, Legislative Assistant, Committee on the Judiciary, House of Representatives, 8 U.S.C.A. page 39.

The laws that apply generally to aliens may also apply to an alien crewman. However, Congress has consistently followed a policy that most laws that afford relief to aliens generally will not be available to alien crewmen.

First of all, Congress vested discretionary authority in immigration officers in permitting alien crewmen to land temporarily during the time their vessel is in port, for a period not to exceed 29 days. During this period, if the immigration officer determines that the crewman is not bona fide or does not intend to depart on his vessel, his conditional permit to land may be revoked. If revoked, the crewman is to be taken into custody and the master of the vessel is required to receive and detain him for deportation from the United States (Section 252(b), Immigration and Nationality Act.) In such a case, Congress has specifically provided that "*Such alien is not to be given a deportation hearing under the procedures prescribed in Section 242*" Immigration and Nationality Act (8 U.S.C. 1252), before a special inquiry officer, with an appeal to the Board of Immigration Appeals. <sup>6</sup> A warrant of arrest required by Section 242 when an alien is

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<sup>6</sup> The constitutionality of Section 252(b), 8 U.S.C. 1282(b), was upheld in *Savelis v. Vlachos*, 137 F.Supp. 389, 395-396 (E.D. Va.), affirmed 248 F.2d 729 (C.A.4)



taken into custody pending determination of deportability is not required. (8 C.F.R. 252.2). The proceeding is summary and swift.

This proceeding is to be distinguished from the proceedings afforded to an alien *other than a crewman* who is granted shore leave, and who then deserts his ship or otherwise over-stays the time for which he was permitted to land. When such an alien is apprehended, he comes within the prescription of Section 242 (8 U.S.C. § 1252). When an alien is entitled to such a proceeding, he is to be given notice of charges, full opportunity to present evidence, right to cross-examine witnesses, etc., and in addition he may appeal to the Board of Immigration Appeals (8 C.F.R. 3.1). He may apply to the special inquiry officer during the deportation proceeding for statutory remedies to which he is eligible. (8 C.F.R. 242.17).

In sum, the alien crewman, such as appellant, whose landing permit has been revoked pursuant to Section 252(b) does not have a right to a deportation hearing: the revocation is accomplished as a matter of discretion. No notice of charges is given and no formal hearing before a special inquiry officer is required, although—as shown in the statement above—appellant was given the virtual equivalent of such a hearing in this case.

The case law in this area is in accord with the Government's position herein and the decision of Judge East below (R. 88). In *Glavic v. Beechie*, 225 F. Supp. 24 (S.D. Texas), affirmed 340 F.2d 91 (C.A. 5), the Fifth Circuit in a *per curiam* opinion squarely held that an alien Yugoslavian crewman whose conditional landing permit had been revoked after he made known to the Immigration Service that he no longer intended to depart this country on his vessel was not entitled to a hearing under the general deportation provisions (8 U.S.C. 1252-1254) before a special inquiry officer on his claim of alleged persecution if returned to Yugoslavia. See also *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, (C.A.) 2) petition for certiorari pending; *United States ex rel. Lam Hai Cheung v. Esperdy*, 345 F. 2d 989, 990 (C.A. 2). The Court further held, as did Judge East below, that the alien was entitled to be heard (as here) on his claim of alleged persecution under Regulation 8 C.F.R. 253.1(e) which provides pursuant to 8 U.S.C. § 1182(d) (5) for parole into the United States of an alien crewman "who alleges that he cannot return to a Communist country because of fear of persecution in that country on account of race, religion or political opinion." 8 C.F.R. 253.1(e).

In its careful and lucid opinion in the *Glavic* case the District Court distinguished the case of *Szlajamer v. Esperdy*, 188 F.Supp 491 (S.D.N.Y.), cited

by appellant in his brief (BR. 10), as follows: (255 F.Supp. 24)

"The unusual element which complicates this case is that plaintiff, alleging that he would be subjected to persecution if returned to Yugoslavia, requested that he not be returned to his ship. A very similar situation occurred in *United States ex rel. Szlajamer v. Esperdy*, 188 F. Supp. 491 (S.D.N.Y. 1960). At the time that case was decided there was no regulation providing an opportunity for relief to an alien crewman claiming that he would be persecuted if returned to his ship and thence to his homeland. The federal district court under those circumstances held that the seaman was entitled to be heard on his claim under 8 U.S.C.A. § 1253(h), the general provision under which this plaintiff desires to be heard, notwithstanding the statutory proviso that 8 U.S.C.A. § 1252 procedures were inapplicable to alien crewmen. That decision was not appealed, and whether its analysis of the statute under those conditions was correct or not, its correctness certainly appears questionable under present conditions and in light of the recent decision of the Supreme Court in *Foti*, supra, in which it was held that a statutory reference to 8 U.S.C.A. § 1252(b) included by implication the closely related sections 1253 and 1254, requiring direct appeal to the courts of appeal on final orders of denial of suspension of deportation under those sections.

"As a result of the *Szlajamer* case, the Attorney General promulgated the regulation, 8 C.F.R. 253.1(e), which provides an opportunity under 8 U.S.C.A. 1182(d)(5) for an alien crewman to obtain parole into the United States if he faces persecution in a Communist or Communist-dominated country. The application of

that regulation in the present case appears to coincide with the statutory framework, and to be much more in keeping with the congressional intent as applied to alien crewmen than Szlajmer. Therefore, the Court is of the opinion that a hearing before a special inquiry officer under 8 U.S.C.A. § 1253(h) is not required by the Act in this case."

Given this statutory background and the decisional law interpreting it, we submit that Judge East was correct in holding appellant was not entitled to a hearing before a special inquiry officer on his claim of physical persecution, and in any event this decision which was not appealed was *res judicata* in the subsequent injunctive action as was so held by Judge Kilkenney (see statement *supra*).

**B. Appellant is not entitled to a hearing before a special inquiry officer simply because his ship is no longer in port.**

In his brief, appellant argues (BR. 10-13) that he is entitled to reopen this case and to a hearing before a special inquiry officer on the ground that his ship has long since departed this country and that the need for summary deportation no longer exists. To support his position, appellant quotes (BR. 12) from the treatise on "Immigration law and Procedure" by Gordon and Rosenfield to the effect that a crewman "whose vessel has left" should be expelled in accordance with normal deportation procedures including a hearing before a special in-

quiry officer. Whether or not this treatise correctly states the law, the Section quoted is clearly inapplicable on its face because it expressly applies to "crewmen whose vessel has left." In the present case, appellant's landing permit was revoked while his ship was in port. Similarly, appellant's reliance (BR. 13) upon *Matter of M*, 5 I and N, DEC 127 1953) is misplaced because in that case the crewman's ship had already left the port before he was taken into custody. It is irrelevant that, because of the delay caused by appellant's various legal maneuvers, his ship subsequently left the port. A contrary result would vitiate the special procedures provided by Congress in Section 252(b), 8 U.S.C. 1282(b). Otherwise a crewman could delay his departure until his ship had left by habeas corpus or other legal action and then be rewarded for his procrastination with a hearing generally reserved for aliens other than crewmen under Section 242(b), 8 U.S.C. 1252(b).

**C. Appellant is not entitled to reopen the case on his claim of alleged persecution on account of religion and political opinion**

Appellant is not entitled to reopen the case, as he claims (BR. 8-10), on the basis of the 1965 amendment (made a few months after Judge East's decision) to Section 243(h) which permits a stay of deportation to an alien within the United States who—in



the opinion of the Attorney General—would be subject to persecution on account of race, religion or political opinion. As was held by Judge East below and in *Glavic v. Beechie*, *supra*, appellant is not eligible for this form of discretionary relief which applies to deportation proceedings for aliens generally under Section 242(b), 8 U.S.C. 1252(b).

Again, no appeal was taken from this decision and the matter was properly considered to be *res judicata* by Judge Kilkenny.

In any event, as pointed out in the *Glavic* case, *supra* (225 F.Supp. at p. 24) the amendment in question merely changed the statute to a form identical to Regulation 8 C.F.R. 253.1(e), namely "persecution on . . . account of race, religion, or political opinion." Consequently, the Supreme Court's opinion in *Soric v. INS*, 384 U.S. 285, cited in appellant's brief at page 9, is inapplicable to this appeal since that case involved an application under 8 U.S.C. 1253(h) which had been denied before the statute was amended, in contrast to the present case which pertains to an application by an alien crewman properly heard under 8 C.F.R. 253.1(e).

Moreover, the thorough January 25, 1965, opinion of District Director Urbano expressly discussed and rejected each of the criteria of race, religion, or political opinion, and held that appellant would not

be subjected to such persecution—except the appropriate punishment which might be imposed for his wilful failure to leave with his ship. (R. 107-110). In reviewing this decision, Judge East noted the “complete absence” of evidence substantiating appellant’s claim of persecution for his political beliefs (R. 94). Although Urbano’s findings, and the decision of Judge East refer primarily to “physical” persecution, appellant has failed to show either in the proceedings below or here how he would meet the test of “persecution” generally. Significantly, appellant’s application for parole filed by him after the amendment to 8 U.S.C. 1253(h) and after his private bill for relief had been turned down by the Senate Judiciary Committee, referred only to the prior record before Judge East in claiming that he would be subject to anticipated persecution on account of religion or political opinion (R. 34). Neither Urbano, in his decision of June 23, 1966, denying this application for parole (R. 32), nor Judge Kilkenney in his decision rejecting the claim for injunctive relief (R. 20), was persuaded that appellant was entitled to reopen the case on the basis of the record in the prior case. Indeed, the only specific matter raised by appellant on his claim of “persecution” is his assertion (BR. 13) that both Urbano and the Courts below failed to consider “the prospect of harassment and prolonged imprisonment for violated exit restrictions as a factor to be considered under ‘persecution’ ”. We submit that to the con-

trary, this matter was specifically considered by Urbano in his decision of January 25, 1965, which was carefully reviewed by Judge East. In this decision Urbano expressly referred (R. 108) to the case of *Sovich v. Esperdy*, 319 F.2d 21 (C.A. 2), cited by appellant (BR. 13), to the effect that an alien threatened with long years of imprisonment, perhaps even life sentence, for attempting to escape a Communist dictatorship would be entitled to asylum on the ground of physical persecution. Obviously, Urbano found that such a claim in this case was without foundation when he noted that appellant would probably be confined for a brief period by Yugoslav authorities for investigation of his desertion of the ship but that he would not be subjected to a long jail sentence or suffer the "dire punishment he recounts." (R. 108-109). This finding of Urbano was not questioned and was upheld by Judge East and appellant—aside from the fact that the matter is *res judicata* — clearly has no cause to complain on the merits.

#### **D. Appellant is not entitled to a Voluntary Departure.**

Appellant claims (BR. 16) that, in the event his claim to further relief is denied, that he be granted the opportunity under 8 U.S.C. 1254(e) "to depart voluntarily from the United States at his own expense in lieu of deportation". Appellant's argument in this regard is again based—we respectfully sub-

mit—on a confusion of the distinction between the ordinary deportation proceedings under 8 U.S.C. 1252-1254 and the present exclusion proceeding under the alien crewmen provisions of 8 U.S.C. 1281-1282. The two cases cited by appellant in his brief (BR. 16) in support of his argument are not in point since both decisions dealt with the privilege of voluntary departure provided by Section 244 (e) 8 U.S.C. 1254(e). This privilege is limited by its terms to “an alien under deportation proceedings” pursuant to 8 U.S.C. 1252, *et seq.* and has no application to the instant case which falls squarely within the alien crewmen provision of 8 U.S.C. § 1282(b). As previously related, this section provides for deportation of the alien crewman by returning him to the vessel or transportation line which brought him to the United States, and expressly states that the general deportation statute (8 U.S.C. 1252) has no application to this type of case.

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that the judgement below should be affirmed.

**SIDNEY I. LEZAK**

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District of Oregon

**NORMAN SEPENUK**

Assistant United States Attorney



**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date::            day of January 1967.



No. 21272

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United States  
**COURT OF APPEALS**  
for the Ninth Circuit

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VELJKO STANISIC,

*Petitioner,*

v.

UNITED STATES IMMIGRATION AND  
NATURALIZATION SERVICE and ALFRED  
J. URBANO, District Director, United States  
Immigration and Naturalization Service,

*Respondents.*

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**PETITIONER'S REPLY BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

---

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**United States**  
**COURT OF APPEALS**  
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VELJKO STANISIC,

*Petitioner,*

v.

UNITED STATES IMMIGRATION AND  
NATURALIZATION SERVICE and ALFRED  
J. URBANO, District Director, United States  
Immigration and Naturalization Service,

*Respondents.*

---

**PETITIONER'S REPLY BRIEF**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**SUMMARY OF ARGUMENT**

The Government's statement of the statutory scheme applies to crewmen with a wanderlust who jump ship, but not to a crewman seeking asylum to escape persecution. To apply a summary proceeding under 8 U.S.C. 1282 (b) to the latter is a denial of due process.

All hearings and proceedings heretofore have been under the old statute (8 U.S.C. 1253 (h)) dealing with "physical persecution," and the Government ignores the shift in goal posts to a much more liberal framework, and a new set of rights based thereon.

An examination of the record shows that the hearing before the District Director, besides being limited to "physical persecution" under the old statute, was marked with bias and prejudice not in keeping with due process.

Therefore, this Petitioner should have his "day in court" before an impartial special inquiry officer to present his evidence under the statute as amended.

### **1. Statutory Scheme**

The Government's narrative of the deliberations of the Congressional Committees is relevant to the thousands of seamen who jump ship to get better jobs or otherwise find "greener pastures," but it is irrelevant to the case of the crewman trying to escape persecution. Very few indeed can claim that they are the objects of persecution. Stanisic is one of these. Human rights to life and freedom from persecution<sup>1</sup> are paramount to the need to keep alien seamen and ships moving. The claim of asylum places this case in a spe-

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<sup>1</sup> Cf. *Mississippi et al v. Meredith, etc.*, 372 U.S. 916, 83 S. Ct. 722, 9 L. Ed. 2d 723 (1963) pursuant to which the Federal Government even put a regiment at "Ole Miss" to assure one Negro student the right to an education at the college of his choice.

cial category and does not fit the general rule. Most civilized countries accord asylum to a refugee from persecution, regardless of how he arrives. Such a refugee has little choice, and the usual machinery of passports, visas and quotas is not open to him. To the extent that the Government's interpretation denies a sanctuary to Stanisic it is stating bad law. It runs contrary to the mid-century trend in the United States.

The refugee has no choice; it is his life and sanity—or else escape to some asylum. The summary proceedings which the District Director has invoked here cannot be expanded to fit under our system of due process a person seeking asylum.

The Supreme Court, since the writing of Petitioner's Opening Brief, has stated in *Immigration Service v. Errico*, — U.S. —, 87 S. Ct. —, 17 L. Ed. 2d 318 (1966), a case even involving fraud, the following rule:

“Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:

“ ‘We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture of misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less

generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. . . .’ ”

The statutory scheme must never lose sight of the humanitarian goal, regardless of how the alien came to these shores. This is woven into the Constitution.

It is disturbing to note that the case of *Savelis v. Vlachos*, 137 F. Supp. 389, affirmed 248 F.2d 729 (C.A. 4, 1957) which the Government uses (Br. 14) to sustain the constitutionality of Section 252 (b) of the Immigration and Nationality Act, 8 U.S.C. 1282 (b), does not involve any alien crewman seeking sanctuary from persecution, but only three seamen showing a need for hospitalization and seeking a change from a D-1 to a D-2 permit. As applied to the Petitioner who is seeking to escape persecution in Yugoslavia the summary and swift proceedings under Section 252 (b) have not here, and cannot in the very nature of the proceedings where the District Director is both prosecuting attorney and judge, be any constitutional exercise of due process. As to this Petitioner the applicability of Section 252 (b) is unconstitutional; all the earmarks of due process are lacking.

As Judge Moore in a dissenting opinion in *U. S. ex rel. Stellas v. Esperdy*, 366 F.2d 266, (C.A. 2, 1966), said:

“Here is a case so violative of the fundamen-



tals of due process that in this day and age when courts seem greatly concerned with fair trial, the right to a hearing and meaningful appellant review, I simply cannot understand, much less agree with, the result reached by the majority. The facts tell a story reminiscent of the 'due process' of the Middle Ages, the Star Chamber — even of the shanghaiing of seamen. . . ."

## II. The Government Ignores the Shift in Goal Posts

In the hearing before the District Director the statute then in force (8 U.S.C. 1253 (h)) dealt with "physical persecution," and the caption on the Immigration Service file of the Petitioner so indicates (viz. R. 101). The case before the Honorable William East, District Judge, also dealt only with "physical persecution":

" . . . Evidence substantiating the petitioners' claim of physical persecution for their political beliefs is conspicuous by its complete absence."

But the Government ignores the fact that the statute as amended October 3, 1965 has given a new right not existing at the time of the hearing in Case No. 65-10,—a right which could not have been adjudicated then. A new issue has arisen with the new goal posts, and no longer do the rules require "physical persecution."

This Petitioner is entitled to his hearing on the question of "persecution on account of race, religion, or political opinion."

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<sup>1</sup> Another seaman was also involved in that case.

### III. The Actual Departure of the Ship Voids the Need for a Summary Deportation Procedure.

In dismissing Petitioner's authorities (Appellee's Brief, pp. 18-19) on the ground that the delay was gained by Petitioner's maneuvers, and that the Petitioner had actually been taken into custody before the ship had left, is the Government encouraging seamen to hide for the required period? Stanisic showed good faith and openly and promptly presented himself to the Immigration Office in Portland two days after he had made his decision to seek asylum. For his good faith should he be penalized and thereby be denied a full and fair hearing before a special inquiry officer? If the Government be correct, he would have gained such a right if he had used deception and flight. Surely this cannot be good law. Stanisic had made a legal entry.

The *Matter of M*, 5 I. & N. 127 (1953) is applicable here, as is also the rule in *Gordon and Rosenfield* (Br. 12).

### IV. Bias and Prejudice

The Government contends that Petitioner's claim of persecution was rejected as being without foundation. Yet, let us look at what even Urbano's opinion of January 25, 1965 shows:

"... he was told then that if he ever tried it [exit from Yugoslavia] again he would be sentenced to life imprisonment. (R. 103)

"When Tito took over in 1945 the applicant's

father lost both of his jobs. Because he was anti-Communist he was not given the pension to which he was entitled. . . . The applicant stated his father's life was twice threatened by the Communists after the war, he was beaten and his home was ransacked. . . . (R. 103)

"The applicant stated that more than 30 of his uncles and cousins were killed by the Communists after the war, the last being in about 1950. . . . (R. 103)

"The applicant stated that 80 per cent of the Orthodox churches in Yugoslavia have been closed by the authorities, but that most of the Catholic churches are open. . . ." (R. 104)

Witnesses hurriedly rounded up by the Petitioner testified:

"[The witness] . . . was called before the secret police and questioned about remarks he had made in favor of the United States. He was admonished that he had better be careful or he might get into trouble. . . .

". . . the political prisoners there were tortured, beaten and killed. He personally saw only one prisoner beaten, but the stories about the other atrocities were given to him by other persons allegedly imprisoned for political reasons. . . .

"The witness stated that if the applicant [Stanisic] is sent to Yugoslavia he will be badly punished, and it would be better for him to die first. He stated he will suffer broken arms and ribs and other tortures. . . ." (R. 105)

Rade Dzankic, who escaped from Yugoslavia but was caught and imprisoned for three years, stated:

“ . . . that while in jail in Yugoslavia he suffered many tortures, such as being beaten, placed in solitary confinement, and being starved. He said the other political prisoners were treated the same way. . . .

“It is the opinion of this witness that if the applicant is returned to Yugoslavia he will be tortured and will suffer punishment much more severe than that which would be inflicted on a Communist in the same circumstances. . . .” (R. 106-107)

In the face of all this Urbano naively concluded that:

“ . . . in many instances the authorities in Yugoslavia in recent years have been considerate and understanding in their dealings with their nationals, whether their beliefs be for or against the Communists. . . .” (R. 109-110)

In the meantime the Associated Press on September 24, 1966 (The Oregonian, September 24, 1966, p. 3) reported that a university lecturer has been sentenced to a year in prison in Yugoslavia for urging a multiparty system, with an added ban of silence as well as a fine. In yet another instance, the former Communist vice-president of Yugoslavia, Milovan Djilas, languishes in prison because of his exposure of the Communist bureaucracy in Yugoslavia.

The Immigration Service cannot in any way guarantee the safety of the Petitioner in the event he be

deported. It has no assurance from the Yugoslav Government or anyone else as to his fate, if he be returned to Yugoslavia.

Such an opinion by the District Director, sitting as both prosecuting attorney and judge at a hastily arranged summary hearing, clearly demonstrates bias and prejudice. For the Government to say (Br. 15) that the Petitioner was given the virtual equivalent of a hearing before an impartial special inquiry officer overlooks the fact that it was this District Director who judged. The coin rings false and does not fit our American standards of fairness and due process.

#### **V. Postscript**

As this brief goes to the printer, the news of the bombing of the Yugoslav embassies and consulates simultaneously in the United States and Canada heightens the probability that the Petitioner-Appellant with his anti-Communist background will be dealt with severely, if he is deported to Yugoslavia, not because of leaving the ship in Coos Bay but for his anti-government family ties and lack of belief in Communist ideology and guilt by association.

#### **CONCLUSION**

Therefore, the judgment below should be reversed, and the Petitioner should be granted a full and fair hearing before an impartial special inquiry officer according to normal deportation procedures.



In the alternative, and only if all other remedies are unavailing, he should be allowed a reasonable time to leave on a voluntary basis.

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Attorneys for Petitioner

#### **CERTIFICATE OF COUNSEL**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

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No. 21308

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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RONALD E. GATES,  
*Appellant,*

vs.

P. F. COLLIER, INC., a Delaware Corporation,  
*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII.

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BRIEF FOR THE APPELLANT

**FILED**

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OCT 7 1966

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**No. 21308**

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**IN THE**  
**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

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**RONALD E. GATES,**  
*Appellant,*

vs.

**P. F. COLLIER, INC.,** a Delaware Corporation,  
*Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE**  
**DISTRICT OF HAWAII.**

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**BRIEF FOR THE APPELLANT**

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**JURISDICTION**

The appellant, a citizen of the State of Hawaii, filed a complaint against Appellee, a corporation organized in Delaware and having its principal place of business in New York, in the United States District Court for the District of Hawaii on the 9th day of July, 1964, alleging diversity of citizenship and claiming an amount in excess of \$10,000.



all under 28 U.S.C.A. 1332. (Rec. 361)<sup>1</sup> Appellee filed a counterclaim on July 30, 1964 conceding the jurisdictional claims of Appellant. (Rec. 379) (Tr. 3) After a jury-waived trial, the trial court on July 8, 1966 entered judgment on the counterclaim for Appellee and dismissed Appellant's complaint. (Rec. 685) Notice of Appeal was filed on the 13th day of July, 1966. (Rec. 713) This appeal is based on the general appellate statute 28 U.S.C.A. 1291, which gives this court jurisdiction for appellate review of final decisions of the court below.

### SPECIFICATION OF ERRORS

1) The trial court erred in finding and concluding that the April, 1960 and September, 1961, Gates-Collier contracts were not in violation of the Foreign Exchange and Foreign Trade Control Law of Japan in that:

a) The agreements were schemes to violate said law by converting from Japanese yen and sending out of Japan by padding invoices under its 97B account (Japan Civilian) U.S. Dollars Colliers was prohibited by said law from sending out and paying Appellant, an exchange resident, U.S. Dollars in the United States, an act also prohibited by said law.

b) The agreements were schemes to violate said law by sending out of Japan under its 96B account (Military personnel), U.S. Dollars Colliers was prohibited by said law from sending out and paying Appellant U.S. Dollars in the United States, also prohibited by said law.

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1—(Rec. ) means the pleadings, interrogatories and answers, admissions and trial briefs filed below and transmitted as part of record.

(Tr. ) means the transcript of testimony transmitted as part of record.

c) The agreements required prior Japanese Governmental approval because they were service contracts; said law required such approval but no such approvals were obtained.

d) That the agreements contemplated sending out of Japan to New York book orders; that this could not be done by Colliers without a license under said law; no such license was received.

2) The trial court erred in not finding and concluding the agreements of April, 1960 and September, 1961, illegal, not only under the Japanese law, but under the New York law as well because in New York a contract entered into in New York to violate a law at the place of performance (Japan) is also illegal in New York.

3) The trial court erred in finding and concluding that Appellant was not entitled to any recovery under Count I of the Appellant's complaint based on quantum meruit in that the contracts were illegal contracts *malum prohibitum* and Colliers is liable under New York law (place of enrichment) on quantum meruit counts for the unjust enrichment under such circumstances.

4) The trial court erred in finding and concluding that Appellant embezzled and committed fraud in Japan, with relation to Appellant's acts in Japan when Colliers did not prove the Japanese statute on embezzlement nor the Japanese substantive law of fraud where one sues for damages for fraud in a civil suit.

5) The trial court erred in finding and concluding that the Tokyo District Court decree enjoining Colliers from interfering with Appellant in the performance of his con-

tract in Tokyo as a Representative of Colliers was fraudulently obtained in that there was no fraud proven, no law or civil fraud of Japan was proven and further the law is that an order or judgment of a foreign court cannot be voided by the trial court merely by proof that the testimony or affidavit presented to the court in Japan was not accurate.

6) The trial court erred in not finding and concluding that there were three divisible portions with relation to the contracts of April, 1960 and September, 1961 and that since the defense of fraud concerned only the 97B (Japanese Civilian) portion, Colliers had no defense to the 96B (Military) and 98B (Australian) portions of the contracts.

7) The trial court erred in finding and concluding that Collier's Exhibits B-13 A, B and C were evidence of fraud and embezzlement and found fraud and embezzlement based thereon in that the entries were only book entries and the acts of Appellant in Tokyo were in exact accordance with written directions of Colliers and since Appellant followed Collier's written directions, Appellant cannot be found engaged in any fraud or embezzlement; that the trial court's finding and conclusion that there was no debtor and creditor relationship between Appellant and Colliers was in error in that said finding and conclusion is contrary to the admissions of Collier's officers and the written documents introduced as evidence in this case.

8) The trial court erred in finding and concluding that damages to the extent of \$169,013 were proximately caused by the fraudulent acts and acts of embezzlement

of the Appellant in that there was no evidence to support such a finding.

9) The trial court erred in denying Appellant's objection in the lower court that by an election to terminate the contract in the manner Colliers did and suing in tort for damages, Colliers rescinded its contract of September, 1961 and Colliers cannot thereafter sue on said contract for rights and obligations to accrue subsequent to said termination under said contract because the contract was annihilated by said rescission and the trial court erred in granting Colliers \$169,013 as damages based on the 12½% and 10% clauses in the contract which could be assessed based on collection losses appearing subsequent to said date of termination.

10) The trial court erred in finding and concluding that Colliers was damaged in the sum of \$25,000.00 for attorney's fees and \$11,011.99 for travel expenses, in that under the causes of actions alleged in the counterclaim Colliers isn't entitled to recover anything and further it did not have a defense of fraud as it alleged.

11) The trial court erred in finding and concluding that Appellant is not entitled to recover anything and awarding Colliers judgment in the sum of \$306,676.25 in that on the evidence and the law, judgment should have been in favor of Appellant in the sum of \$422,804.98 and the counterclaim of Colliers should have been dismissed.

### **STATEMENT**

This case involves a complaint by Gates, appellant, regarding commissions in the sum of \$422,804 allegedly due

appellant Gates from Appellee Colliers for the selling of Collier's encyclopedias in the sum of \$1,810,262 (U.S. Dollars) in Japan, Australia, and other Pacific countries during the period April, 1960 to October, 1962. (Rec. 361) Colliers filed counterclaims based on alleged embezzlement, stealing, fraud, dishonesty, conversion, breach of contract and debt, all in the sum of \$833,115. (Rec. 381)

The jury-waived trial below was materially aided especially in the area of arithmetic, by a stipulation between counsel that all interrogatories and answers on record and requests to admit with the admissions on record, may be considered by the trial court without any restrictions. (Tr 295-297) The interrogatories, answers and admissions are part of the record in this Appeal. (Rec. 19-278)

Appellee, Collier, a Delaware corporation with its principal office in New York, is a publisher of encyclopedias. Starting on or about 1954 Appellant Gates, a native of Dallas, Oregon (Tr. 236) then in Japan, started selling Collier's encyclopedias in Japan under an arrangement whereby Gates purchased Collier's encyclopedias outright at \$69.00 per set under a strictly buyer-seller arrangement. (Tr. 72) Gates also started selling Collier's encyclopedias on an independent contractor basis to military personnel serving in Japan. This dual arrangement continued till later reduced to written agreements. By 1959 there existed between Colliers and Gates & Son Co., a Japanese corporation, two written contracts. The first contract, Plaintiff's Exhibit 5 in Evidence, expressed the abovementioned buyer and seller agreement at \$69.00 per set. The second contract dealing with military sales on an independent contractor



basis (expressly providing that no employer-employee relationship existed) is evidenced by Plaintiff's Exhibit 4 in Evidence.

On or about April 15, 1960, an agreement consolidating the abovementioned agreements, Exhibits 4 and 5, into a single contract, Plaintiff's Exhibit 1 in Evidence, was entered into between Appellant Gates personally and Collier. (Plaintiff's Exhibit 2 in Evidence replaced said Exhibit 1 in September, 1961, for reasons immaterial herein.) Collier after entering said agreement Exhibit 1 registered to do business in Japan. Japan was then and still is under Foreign Exchange Control. (Exhibit 98) Collier was experienced in the area of international monetary manipulations in that Collier had prior "trouble" in black market operations of getting U.S. Dollars out of countries where there was exchange control, for example it cost Collier a painful \$.25 (U.S.) per U.S. Dollar to get money out of Egypt. (Exhibit 118) Therefore Collier started its business in Tokyo with as little of its own U.S. Dollars as possible and tried to get the maximum out as possible, including Gates' share of the proceeds of sale. It started on the Japanese yen equivalent of \$3,600.00 advanced by Gates and books borrowed from Gates Co. (Tr. 350) They intended to not pay Gates his commissions on Japanese yen sales till yen accumulated from the sales of Colliers books in Tokyo. The selling was done for Gates by about 15 salesmen of R. E. Gates & Son Co., Ltd. (Tr. 269) It was stipulated in open court that Gates himself was an employee of R. E. Gates & Son Co., Ltd. (Tr. 344, 354). A set of encyclopedia with an Atlas and Dictionary sold for 92,700 Japanese yen or \$269.50 (U.S. Dollar equivalent). Gates was immediately entitled to 34% (\$83.84) of

the net sales price as sales Commission on any sale, cash or term, even where down payment was \$10.00. (Plaintiff's Exhibit 1 in Evidence) If 50% of the purchase price was paid within 15 months, Gates was entitled to another 7%. Gates was allowed to give a 5% discount to each customer but where he did not give the 5% discount, he was allowed to keep the 5% himself. (Plaintiff Exhibit 17 in Evidence) If sales reached a million dollars per 12 month period he was entitled to a 2% bonus and 1% if in excess of half a million but below a million. (Plaintiff's Exhibits 1 and 2 in Evidence)

The contract further provided that Gates guarantee Colliers against loss by reason of bad accounts. (Plaintiff's Exhibits 1 and 2 in Evidence) A so called 12.5% expected loss clause was written into the agreement so that in effect any losses in excess of 12.5% of the sales will be charged against Appellant Gates and if there were no losses Gates received the 12.5%. Any losses between 12.5% and zero were treated in a manner more particularly described in the argument below. By losses under the April, 1960 and the September, 1961 agreement Colliers meant "loss to Collier during the term of this agreement". (Tr. 418) (Plaintiff's Exhibit 1 in Evidence)

The evidence below was uncontradicted regarding the contract of April, 1960 and its substitute of September, 1961, being divisible into three parts:

- a) Sales to Japanese Civilian (97B) and Japanese Schools (99B)
- b) Sales to U. S. Military Personnel (96B)
- c) Sales in Australia (98B)

"B" meant a separate branch. See footnote 8 page 44.

The parties agreed to give the parts the numbers indicated and each part was operated and dealt with and accounted for separately. (Plaintiff's Exhibit 9 in Evidence) The employees for each part were separate groups. 97B and 99B Sales (Japanese Civilian and Schools) were necessarily conducted by a Japanese Sales staff in Tokyo with sales in Japanese Yen. The U. S. Military personnel Sales (96B) were handled by another set of salesmen on a U. S. Dollar basis, clearly separate and apart from the foregoing 97B and 99B, (Tr. 123, 164) The Australian Sales 98B was under a separate contract made in January, 1962 and it was handled through a separate staff and office in Sydney, Australia. Australian sales were in Australia and Australian Currency. (Tr. 173-175) Gates was charged by Collier for alleged fraud on the 97B (Japanese Civilian and Schools) accounts but as for the 97B (Military) and 98B (Australian) accounts, by Collier's own admission in court by Mr. Brown there was no wrong committed and the alleged fraud if any was with respect to said 97B (Japanese Civilian) account only. (Tr. 35-36) Therefore Gates argued in the court below that as for the 96B (Military) and 98B (Australian) parts of the divisible contracts Colliers had no defense. The contracts were subject to termination only upon the giving of two weeks' written notice. No such notice was given till sometime in October, 1962. Gates claims that all parts of the divisible contracts were never terminated lawfully till October 16, 1962 and the summary possession and takeover by Colliers of all three parts of said divisible contracts, in May, 1962, was illegal.

Appellant Gates introduced an official English trans-

lation of the Japanese Foreign Exchange and Foreign Trade Control Law in evidence. (Plaintiff's Exhibit 98 in Evidence) Gates contended in the court below that Colliers knowingly schemed and planned to violate said Japanese Law when prior to April 15, 1960, it was licensed under said Japanese Foreign Exchange Law to receive in New York \$69.00 (U. S. Dollars) per set for its encyclopedia sold by Gates Co. in Tokyo, Japan (Plaintiff's Exhibit 23 in Evidence) but subsequent to said date after Plaintiff's Exhibit I was entered into, Collier was licensed to receive \$153.00 (U. S. Dollars) for the same set of encyclopedia (Plaintiff's Exhibit 24 in Evidence). Collier's General Superintendent and Assistant Secretary Simon J. Nork admitted in his sworn answers to interrogatories filed in this cause that the sudden increase in the import licenses from \$69.00 per set to \$153.00 per set was the "*proper value to assign to each set of Collier's Encyclopedia for Japanese currency control purposes.*" (Rec. 261) It will be shown in the argument to follow that the abrupt increase was due to a scheme to send out of Japan, funds Colliers could not legally send out, an out and out "yami" operation, meaning black market in Japanese. Appellant Gates contended in the court below that for this reason the entire Japanese Civilian and Schools, 97B and 99B phases of the contracts were absolutely illegal.

There was an "Outline of Procedure for Opening a Branch in Tokyo, Japan" dated April 1, 1960, introduced in evidence as Plaintiff's Exhibit 9 in Evidence. One of the purposes of the said Outline was to supplement the con-

tract of April 15, 1960, in certain areas where the said contract cannot be more explicit because if expressed more fully in the contract, the contract would on its face flagrantly violate the Japanese Foreign Exchange and Foreign Trade Control Law. For Military sales this Outline expressly provided that the U. S. Dollars collected in Tokyo by Gates shall be directly sent out of Japan to Colliers at New York and that R. E. Gates received his 34% commission in U. S. Dollars by drawing on an "imprest fund" checking account entitled "P. F. Collier Inc., Japan Branch, Tokyo, Japan" established by Colliers with the Long Island Trust Co., Garden City Park, L. I., New York. (Plaintiff's Exhibit 109 in Evidence) It was submitted in the court below that this unlicensed outflow of U. S. Dollars from Japan plus illegal payments to a Japan resident of U. S. Dollars made the 96B (U. S. Military) portion of the contract illegal under the abovementioned Japanese Foreign Exchange and Foreign Trade Control Law. The said Japanese law also prohibited contracts for services involving payment, settlement or any other transaction governed by the provisions of the law unless approved by the Japanese Government. Neither the contract of April, 1960, nor that of September, 1961, were approved. (Tr. 987) Appellant claims that the contracts violated said Exchange law in several other material respects as more fully elaborated in the argument to follow.

Documentary proof Plaintiff's Exhibit 13 in Evidence showed mathematically the division of the \$269.50 (unit



price per set) in Gates' rights and Collier's rights was as follows:

*Gates Rights (59.5%)*

34%	.....	\$84.83	
7%	.....	17.47	
5%	.....	12.50	
12.5%	.....	33.69	
1%	.....	2.70	\$151.19
		<hr/>	

*Colliers Rights (40.5%)*

40.5%	.....	\$118.31	118.31
		<hr/>	

Total 100%

Total

\$269.50

The \$172.00 remitted to New York per set under the Japanese Import license was made up (Tr. 285) of the following:

*Colliers' Rights*

40.5%	.....	\$118.00
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*Gates' Rights*

12.5%	.....	34.00
7%	.....	17.00
1%	.....	1.00
		<hr/>

Total      \$172.00

Therefore out of each sale of \$269.50, after deducting \$84.83 as the 34% commission due Gates and further deducting \$172.50, the remittance requirement, there remained only \$12.17. If Gates gave a 5% discount of \$12.50 to the customer nothing remained in his hands. These remittances of \$172.50 per set were not earmarked. Instead, the remittance requirement in the invoices and licenses was for example on a shipment of hundred sets: "Full

amount of invoice covering cost of books, payable in U. S. Dollars in twelve (12) equal monthly installments, starting 30 days from the time this shipment of books has cleared through customs into Japan". (Tr. 250) And so the total of monthly remittances sent, ran from \$6,000.00 to \$18,000.00. (Rec. 139-146) Gates did not at any time default in any of these requirements and sent from Tokyo to New York a total of \$210,000. (Rec. 139-146)

With relation to the alleged charges by Collier of embezzlement by Gates under the 97B Japanese Civilian accounts, the basis of Collier's claim is Exhibits B-13 A, B and C which Collier claimed showed that certain alleged C.O.D. Japanese yen sales in Japan to Japanese Civilians were reported as term sales. *The Japanese Statute on embezzlement was not introduced in evidence by Colliers.* There was no proof as to what was the substantive Japanese law of conversion, stealing, fraud or deceit, applicable to the situation or circumstances in this case. The record was abundant with proof of debit and credit between Colliers and Gates. (Tr. 149) Colliers owed Gates and Gates owed Colliers large sums of money. Colliers conceded that where there was a term sale, even when there was only a yen equivalent of \$10.00 as down payment, there became due immediately to Gates the 34% commission of \$84.83 less however the \$10.00 received or \$74.83. (Tr. 89-90) Colliers owed this amount to Gates on each of these term sales made in Tokyo, Japan. There were 1404 term Japanese yen sales (Rec. 36) (2449-1095 -1404) or a total of \$119,101.32 (84.83 X 1404) was involved. Collier was in no position to pay this large sum to Gates except by following the Outline above mentioned and making pay-

ment to sales people as follows: "*After the Tokyo Bank Account has sufficient yen deposits, the sales people paid on yen accounts will be paid in yen from this account.*" After meeting the monthly remittance requirements Gates did what he was authorized to do in writing. He did not follow Exhibits B-13 A, B and C in his operations in Tokyo but followed Collier's "Outline of Procedure for Opening a Branch in Tokyo, Japan" and the directions as to remittances in Collier's invoices and Import licenses. Gates contended in the court below that under such circumstances there was no fraud or embezzlement. Primarily, since Colliers didn't prove the Japanese Law in relation thereto and further because there could be no fraud where Gates handled the money as he was ordered to do. He had a general power of attorney from Colliers for his Tokyo operations. Plaintiff's Exhibit 82 in Evidence.

Gates claimed commissions due him, as follows:

<u>Account</u>	<u>Due to Gates</u>
97B & 99B	\$ 81,339
96B	153,448
98B	188,017
	<hr/>
	\$422,804

Gates claimed gross sales of \$1,810,262 on figures admitted by Colliers. By charts Gates showed that the above commissions of \$422,804.06 are still due him. The charts are repeated in the argument to follow.

On the above facts the court below dismissed Gates' complaint completely and entered judgment for Colliers and against Gates on its counterclaim in the sum of \$306,676.23. (Rec. 686)

## ARGUMENT

## I

**The April, 1960 and September, 1961, Gates-Collier Contracts Were Flagrant Violations of the Foreign Exchange and Foreign Trade Control Law of Japan.**

The contracts of April, 1960, Plaintiff's Exhibit 1, and September, 1961, Plaintiff's Exhibit 2, were violent violations of the Japanese Foreign Exchange and Foreign Trade Control Law of Japan. The official English translation of the law is in evidence in this case. Plaintiff's Exhibit No. 98 in Evidence.

The contracts were violations because of the several major violations hereinafter discussed. *From their inception the contracts were planned and schemed to violate the said Japanese Foreign Exchange and Foreign Trade Control Laws; these violations were with knowledge and contemplated by Colliers and Gates. Foreign laws having effect on Americans doing business in foreign countries were only recently reviewed by the Supreme Court with much concern and care "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."* *Banco National de Cuba v. Sabbatino*, (1964) 376 U.S. 398, 84 S. Ct. 923, 929. It is submitted that to nations such as Japan which rely on foreign trade extensively, this court's construction of Japan's Foreign Exchange and Foreign Trade Control Law herein will be material and will affect future foreign relations. This court will be taking a role in a very "sensitive area".

The purpose of said Japanese Foreign Exchange Law is stated as follows:

"Article 1. The purpose of this Law is to provide for the control of foreign exchange, foreign trade and other foreign transactions, necessary for the proper development of foreign trade and for the safeguarding of the balance of international payments and the stability of the currency, as well as the most economic and beneficial use of foreign currency funds, for the sake of the rehabilitation and the expansion of the national economy." (Plaintiff's Exhibit 98 in Evidence, page AA1)

Violations of the said Japanese Foreign Exchange Laws are subject to "penal servitude not exceeding three years" or to fine not exceeding 300,000 yen or both. (Plaintiff's Exhibit 98 in Evidence, page AA 16-17)

And the Civil Code of Japan, Plaintiff's Exhibit 100 in Evidence, page FA16, provides as follows:

"Article 90. A Juristic act which has for its object such matters as are contrary to public policy or good morals is null and void."

The trial court with relation to the argument that the contracts of April, 1960 and September, 1961, violated said Japanese Foreign Exchange Law found and concluded that they were not illegal. (Rec. 639-642)

It is submitted that the trial court erred in the above findings and conclusions in that the contracts of April, 1960 and September, 1961 (Plaintiff's Exhibits 1 and 2 in Evidence), were illegal for the following reasons:



**A.—The Japanese Civilian (97B) Portion of Contract Was Absolutely Illegal under the Japanese Foreign Exchange Laws.**

Under Articles 27, 28, 29 and 30 of said Japanese Foreign Exchange Laws (Plaintiff's Exhibit 98, pages AA8-9) it is provided under the title "Restriction and Prohibition of payment", as shown in footnote 2 below. And

2—"Article 27. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan:

- (1) Make any payment to a foreign country;
- (2) Make any payment to an exchange non-resident or receive any payment from an exchange non-resident;
- (3) Make any payment to an exchange resident on behalf of an exchange non-resident or receive such payment;
- (4) Place any sum to the credit of an exchange non-resident or receive any sum for credit from an exchange non-resident." (Plaintiff's Exhibit 98, page AA8.)

"Article 28. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad make any payment to or for the credit of an exchange resident as a consideration or association with payment or other benefit accruing to anyone abroad or acquisition of property abroad."

"Article 29. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad receive any payment from or on behalf of an exchange resident as a consideration or association with surrender of any value abroad."

"Article 30. No person may be a part to creation, modification, liquidation, settlement or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by Cabinet Order:

- (1) Claimable assets expressed in National currency between exchange non-residents;
- (2) Foreign claimable assets between exchange residents;
- (3) Claimable assets between an exchange resident and an exchange non-resident."

"exchange residents", "exchange non-residents" and "claimable assets" are defined (Exhibit 98, pages AA2-AA3) as shown in footnote 3 below.

Colliers obtained under said law import licenses (Tr. 97, 100) and for each imported encyclopedia set with accompanying books, Colliers was licensed to remit \$172.50 out of Japan. (Tr. 280) It is submitted that Colliers in its invoices and application to remit funds padded and included in the \$172.50, sums illegal to remit.

Documentary proof, Plaintiff's Exhibit 13<sup>4</sup> in Evidence, showed mathematically how the Tokyo retail sale price of

3—"Article 6. In order to make uniform the application of this Law and orders issued in accordance therewith the following terminology shall be defined to mean:

- (5) 'Exchange residents' shall mean all natural persons who have their permanent place of abode or who customarily live in Japan, and also juridical persons (corporate bodies, enterprises), having their seat or place of administration in Japan. The branches in Japan (agencies, establishments, etc.) of exchange non-residents are considered to be exchange residents irrespective of whether they are independent in law or not and even if the place of their administration or their headquarters is located abroad.
- (6) 'Exchange non-residents' shall mean all persons, natural or juridical, other than those falling under the meaning of exchange residents.
- (13) 'Claimable assets' shall mean time deposits, demand deposits, insurance policies and claims, balances in current account, any claims to be paid such as arising out of loans or bids or any other claims, expressed in terms of money insofar as they are not embodied within the meaning of other items of this Article."

4—	<u>Gates rights (59.5%)</u>			
	34%		\$84.83	
	7%		17.47	
	5%		12.50	
	12.5%	-----	33.69	
	1%		2.70	\$151.19
	<u>Colliers rights (40.5%)</u>			
	40.5%	-----	118.31	118.31
Total	100%		Total	\$269.50

\$269.50 per set was split. The figures are based on percentages recited in the contracts of April, 1960 and September, 1961 and so Colliers is in no position to deny them. Collier's right was only \$118.31. Why was \$172.00 sent out of Tokyo? Gates testified (Tr. 285) that the \$172.00 was made up of the following percentages in round figures:

<u>Colliers Rights</u>		
40.5% .....	\$118.00	\$118.00
<u>Gates Rights</u>		
12.5% .....	34.00	
7% .....	17.00	
1% .....	3.00	54.00
	Total	<u>\$172.00</u>

Gates' testimony is corroborated by the very fact that the figures based on the contract percentages add to \$172.00. So some of Gates' own funds and claimable assets were sent to New York. Colliers was entitled to ship out only \$118.31 but padded it to \$172.50 to send some of Gates' funds and claimable assets to New York. Defendant's counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of \$18,834.24 (U.S. Dollars) on account of the 12½% commission due. (Tr. 385-387) See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of \$262.05 and \$23,357.49. All of these were clear violations of Article 27 above recited.

In addition to the above proof of violation, the violation is further supported by proof that prior to 1960 when the 1959 contract was in force, Plaintiff's Exhibit 4 in Evi-

dence, Gates was licensed to send out of Japan *only* \$69.00 per set. See also Plaintiff's Exhibits in Evidence 93 and 69. After April 15, 1960, the said \$69.00 per set was raised to \$172.50. Why was this done? Collier's officer Nork under oath in his answer (filed November 10, 1964) to written interrogatories filed in this cause stated as follows:

"59—The unit price assigned to Collier's Encyclopedia 20v. Black Fab. is different in Exhibits 62 and 64 (\$69.00) from Exhibits 61 and 63 (\$172.50) in order to reflect a different, but irrelevant to this lawsuit, accounting allocation of costs to defendant." (Rec. 177)

Appellant Gates was not satisfied with the above answer so he further questioned Colliers on the quoted answer and witness Nork replied under oath as follows in its answers filed February 10, 1965:

"Pursuant to an agreement dated April 15, 1960 between defendant's assignor and plaintiff (hereinafter the agreement of April 15, 1960) and pursuant to an agreement dated September 15, 1961 between defendant and plaintiff (hereinafter the agreement of September 15, 1961), under which agreements plaintiff sold Collier's Encyclopedia on a commission basis, defendant's assignor and defendant had to declare the value of Collier's Encyclopedia imported to Japan for the purpose of Japanese currency control regulations.

"The value of \$153.00 per set, as reflected in Exhibits 62 and 64 attached to Plaintiff's Interrogatories No. 2. was fixed pursuant to the advice and with the consent of plaintiff, Ronald E. Gates. Under the agreements of April 15, 1960 and September 15, 1961, de-

fendant's assignor and defendant understood that \$153.00 *was the proper value to assign to each set of Collier's Encyclopedia for Japanese currency control purposes.*" (Rec. 260-261)

Both of the above answers were under oath of witness Simon J. Nork. Mr. Nork well understood the situation and he well knew that the "Japanese Currency Control" purposes were involved. Any invoice raised 121% from \$69.00 to \$153.00 overnight cannot be explained in terms of additional freight and service charges because Colliers after April 15, 1960, charged Gates about \$20.00 per set for freight and service charges. This is admitted in the record in Collier's answers to interrogatories filed February 10, 1965 (Rec. 268), 2079 sets at \$20.00 per set is \$41,580 while 150 sets at \$20.00 per set is \$3,000.00. Which is reasonable in that "inland Freight, Insurance, Forwarders Fees and Ocean Freight for 100 sets amounted to only \$1,098.35 or about \$10.98 per set. (Plaintiff's Exhibit 23 in Evidence)

Gates' testimony is further corroborated by the fact that Collier in its vouchers of different dates in order to make the padded figure of \$172.50 varied the values of books. For example Plaintiff's Exhibit 26 in Evidence dated July 28, 1960, listed the books as follows:

Cyclopedia (Fab.)	\$153.00
Atlas	9.50
Dictionary	5.00
Home Repair Book	5.00
	<hr/>
	\$172.50



But in Plaintiff's Exhibit 83 in Evidence at pages 2, 3, 4 dated June 19, 1961, November 8, 1961 and April 14, 1961, the unit price on the same Atlas and Dictionary are quoted as follows:

Cyclopedia (Sturdite)	\$155.50
Atlas	10.75
Dictionary	6.25
	<hr/>
	\$172.50

The foregoing glaring discrepancy shows that to Colliers it was more important to obtain the constant figure \$172.50 because it also included Gates' commissions and book values were varied to carry out the illegal scheme.

**B. The U.S. Military 96B Portion of the Contract Was Illegal under the Japanese Foreign Exchange Laws.**

The contracts of April, 1960 and September, 1961, covered sales to Military personnel under 96B accounts. The "Outline of Procedure for Opening Toyko Branch" Plaintiff's Exhibit 9 in Evidence clearly covered Dollar Sales as well as yen sales. (Tr. 81) Paragraph 5(e), page 2, differentiates the two and the Dollar sales were supplied with an "imprest fund" at the Long Island Trust Co., Garden City Park, L. I., N. Y., on which Gates had the power of attorney to draw to pay commissions due him on these Dollar Sales. (Tr. 90)

The documentary evidence in this case, Plaintiff's Exhibits 109 and 110 in Evidence, shows that "P. F. Collier Inc., Japan Branch, Tokyo, Japan" had a checking account at said Long Island Trust Co., Long Island, New York and checks were drawn on said account from Tokyo by Gates

and said Exhibit 110 shows that the checks drawn by Gates were deposited at the First National City Bank of New York, Wells Fargo Bank of San Francisco and the Chemical Bank of New York. The endorsements clearly show this. The funds for the imprest fund at Long Island were deposited by Colliers.

Based on Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers as Evidence and presented to the Tokyo District Court, the total amount remitted in this manner from April, 1960 to May 1, 1960, amounted to:

\$ 97,452.00	
348,082.40	(Tr. 892, modified by stipulation)
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\$445,534.40	

The 34% commission paid to Gates according to said Exhibit 75 was:

\$ 31,342.77
90,313.63
<hr/>
\$121,656.40

And the total 7% commission paid to Gates was:

\$ 86.78
9,731.33
<hr/>
\$9,818.11

These sums were not insignificant. It is submitted that the 96B (Military) portion of the contracts were clear violations of the Japanese Foreign Exchange Laws. The violations were:

- 1) Sending of U.S. Dollars to a foreign country (United States); that is to "*make any payment to a foreign country*" without a license. (Art. 27(1), J.F.E.) (Plaintiff's Exhibit 98 in Evidence)
- 2) Making payment in U.S. Dollars to Colliers in New York or receiving payment in dollars from Colliers in New York without licenses; that is to "*make any payment to an exchange non-resident or receive any payment from an exchange non-resident.*" (Art. 27(2) J.F.E.) (Plaintiff's Exhibit 98 in Evidence)
- 3) Violation of Article 28 heretofore fully quoted.
- 4) Violation of Article 29 heretofore fully quoted.
- 5) Violation of Article 30 heretofore fully quoted.

**C.—Contracts of April, 1960 and September, 1961, Were Service Contracts Which Required Prior Approval.**

Under Sections 42, 43 and 44 of the Japanese Foreign Exchange Laws, the contracts of April, 1960 and September, 1961, were required to be approved by the Minister of Finance. Sections 42, 43 and 44 of Plaintiff's Exhibit 98 in Evidence are quoted in the footnote below.<sup>5</sup>

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5— "Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services *involving payment, settlement or any other transaction governed by the provisions of this law.*"

"Article 43. Unless authorized as provided for by Cabinet Order, no exchange resident shall render services to an exchange non-resident unless an adequate payment is provided in accordance with the provisions of this Law."

"Article 44. Any person or exchange non-resident as specified in the preceding two Articles may be required to obtain prior approval from or present certification of adequate payment to the competent Minister as provided for by Cabinet Order."

No such approvals were obtained in the present case. (Tr. 987) It is easy to defeat the purpose of these exchange laws by contracting for services and scheming to be paid therefor by illegal transactions above outlined in paragraphs A and B. The very purpose of Sections 42, 43 and 44 was to prevent what Colliers engineered in this case.

It is submitted that here again the Japanese Foreign Exchange Law was violated.

#### **D—Illegal to Send Book Orders from Tokyo to New York.**

The next violation was the sending out of Tokyo to New York the Yen or U.S. Dollar book orders so that Collier may borrow on said orders from its New York banks. Under Article 45 of said Foreign Currency Control Law which reads as follows:

“Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment precious metals, securities, or documents embodying rights to claimable assets.”

these yen book orders exported were clearly “documents embodying rights to claimable assets.” There is ample evidence in this case that these book orders were sent out. In fact, Colliers requested in writing that the original be sent to New York. (Tr. 985) (Plaintiff's Exhibit 126 in Evidence)

Therefore it is submitted that when the contract of April 15, 1960, was entered into, it followed an illegal scheme and plan dated April 1, 1960, entitled “Procedure for Opening Tokyo Branch Office” on the fly leaf of which

appears the signature of S. J. Nork, a Collier officer. The September, 1961, contract was an exact reproduction of the April, 1960, contract and every element of illegality of the April, 1960, contract was carried into the September, 1961, contract. It is submitted that as above shown the parties to the contract contemplated, planned and schemed to violate the Japanese Foreign Exchange Laws. The plans contemplated an illegal smuggling out of hundreds of thousands of U.S. Dollars out of Japan without licenses contrary to the Japanese Foreign Exchange Laws.

The trial court findings relate to the Tokyo District Court proceedings. (Rec. 704, 707) The cases there were never tried. Therefore no evidence as extensive as in this case was produced and furthermore no final decision was rendered. The trial court should not have made such findings from inferences where no final decision was reached by the Tokyo District Court.

## II

### **Effect of Illegality of Contracts of April, 1960 and September, 1961.**

The next question is the effect of the illegality argued in foregoing Paragraphs I A, B, C and D of this brief. It is submitted:

- 1) That the contracts were illegal under the Japanese laws and,
- 2) That the contracts were illegal under the New York laws.



In 17 Am. Jur. 2d 507, the writer regarding illegal contracts violating the laws of another country states as follows:

"Moreover, it is said to be well settled that if a contract is entered into with the view of violating the laws of another country it is unenforceable, even though it does not contravene the law of the place where it is made or the law of the forum." (Emphasis ours)

The foregoing is followed in *Hesslein v. Matzner*, (1940) 19 N.Y.S. 2d 402, wherein the court held as follows:

"6. Williston on Contracts, Revised Edition, Section 1749, at pp. 4951, 4952, states:

" 'On the other hand if a contract or sale is made with a view of violating the laws of another country though not otherwise obnoxious to the law either of the forum or of the place where the contract is made, it will not be enforced. The courts will treat bargains as against public policy which have for their object the violation of the law of a sister state.' (Emphasis ours)

" 'This result may be reached either on the ground that it is directly opposed to the law of the place of the contract, or under a principle of the Conflict of Laws that the law of the place of performance is that which should be applied.'

"(3) The contract in the case at bar, while not otherwise obnoxious to the law of New York, was made with a view of violating the laws of another country, and the courts of this state will treat it as against public policy and unenforceable.

"(4) Nor will the court give legal effect to the guaranty which plaintiff claims defendant made. The entire contract being unenforceable as illegal, this court will not attempt to enforce a guaranty which was an integral part of that contract."

The same rule was followed in *Butkin v. Reinfeld*, (1956) (C.C.A. 2, N.Y.) 229 F. 2d 215, Cert. Den. 325 U.S. 844, 77 S. Ct. 50, where the court stated:

"The trial judge further argued that since the L. L. & B. transaction took place in Canada the prohibition laws of the United States did not render it illegal. *But it now seems well settled that if a contract is entered into with a view of violating the laws of another country it is unenforceable even though it does not otherwise contravene the law of the place where it is made or of the forum.* 6 Williston on Contracts, § 1749 (rev. ed. 1938); Restatement of Contracts, § 592; *Graves v. Johnson*, 1892, 156 Mass. 211, 30 N.E. 818, 15 L.R.A. 834, Holmes, J. This appears to be the law of Canada as well. *Walkerville Brewing Co. v. Mayrand*, (1928) 4 Dom. L.R. 500, noted in 42 Harv. L. Rev. 436."

A 1954 case involving the German Foreign Exchange laws, *Callwood v. Virgin Islands Nat. Bank*, (1954) 121 F. Supp. 379 (rev. on other grounds 221 F. 2d 770), is exactly in point in the present case.

Therefore the contracts were illegal both under the Japanese Law as well as the New York Law.

## III

**Count I of Plaintiff's Complaint in Quantum  
Meruit Permits Recovery Where Alleged  
Wrong Is Malum Prohibitum.**

Count I of plaintiff's complaint is a quantum meruit count. The enrichment was and is in New York where monies were sent by appellant and received by Colliers.

It is well settled in conflicts of laws, Section 453, Restatement of the Law of Contracts, that:

*"When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched."*

Defendant admitted that such is the law in the lower court. (Tr. 471)

The leading case in New York State on this subject is *John E. Rosasco Creameries v. Cohn*, 276 N.Y. 274, 11 N.E. 2d 908, 118 ALR 644, wherein it is stated:

*"Illegal contracts are generally unenforceable. Where contracts which violate statutory provisions are merely malum prohibitum, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, Vol. 3, Sec. 1789; Vol. 5 (2d Ed.) Sec. 1630. Cf. American Law Institute, Restatement of the Law of Contracts, Secs. 548, 600."*

See also: *Application of Kamerman*, (1960) C.C.A. 2 N.Y., 278 F. 2d 411; *Watkins v. Sedberry*, (1923) 261 U.S. 571, 43 S. Ct. 411; *Re Joslyn*, (C.C.A. 7) 223 F. 2d 184.

See Annotation, Recovery for Legal Services in Quantum Meruit under a contract which is void as against Public Policy, 100 ALR 2d 1378.

See a 9th Circuit case, *Smith Engineering Co. v. Rice*, (1938), 102 F. 2d 492, where the court held as follows:

“(6) Appellee argues that the company is not entitled to recover, because if the contract and supplemental contract are void, the refiner is also relieved of its duty. While it is true, that neither party can be held under a void contract, the question here is whether, independently of the contract, the refiner is liable on the quantum meruit. In Montana, it is held that a county is liable on quantum meruit for goods purchased by it, although the contract is illegal and void, where the contract ‘is merely *malum prohibitum* and did not contravene public policy.’ *Hill County v. Shaws’ Borden Co.*, 9 Cir., 225 F. 475, 476; *Hicks v. Stillwater County*, 84 Mont. 38, 274 P. 296; *Morse v. Board of Commissioners*, 19 Mont. 450, 48 P. 745; *State v. Dickerman*, 16 Mont. 278, 40 P. 698. Since 7501 places illegal contracts, and contracts impossible of performance in the same category, and recovery on quantum meruit is allowed as to one, like recovery must be allowed on the other.”

See also:

*South American Petroleum Corp. v. Colombian Petroleum Co.*, 177 Misc. 756, 31 N.Y.S. 2d 771, 773.

*Central Hanover Bank & Trust Co. v. Siemens & Halske*, (1936) 15 F Supp. 927 (Aff'd 84 F. 2d 993), Cert. den. 299 U.S. 585, 57 S. Ct. 110.

It is submitted that violations of the Japanese Foreign Exchange laws are *malum prohibitum* and therefore plaintiff should be allowed recovery under his quantum meruit counts.

There is not much dispute as to the total amount of sales from April 15, 1960 to October 16, 1962. Attached hereto at the end of this brief (page 75) marked Exhibit CC is a summary of the figures admitted by Colliers to be the total of the Australian 98B, Military 96B and Japanese Schools and Civilian 99B and 97-B sales, remittances and collections. Commissions earned, commissions received and commissions due, together with proper computation to show the amounts due. (Ans. to Interrogatories Rec. 265 to 278) Also attached are Exhibits DD (page 77) and EE (page 79) showing that Colliers is holding over their rights a total of \$340,871.97.

Based on Exhibits CC, DD and EE above mentioned, Gates contends that he is entitled to the following recovery under his three quantum meruit counts:

#### Australia—98B.

Note, plaintiff's experience shows that 6/7 of the 36% commission is paid salesmen and used to cover expenses. Therefore 1/7 remains for plaintiff. Therefore see Exhibit CC, thus:

\$ 30,065.05 (1/7 of \$210,448.41) .....	(36% row)
40,920.52 .....	7% row
81,298.64 .....	12.5% row
6,503.89 .....	1% row
29,228.95 .....	5% row

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\$188,017.05 amount of suit



## Military—96B.

\$159,989.89 .....	34%	row
32,939.10 .....	7%	row
61,496.65 .....	12.5%	row
4,705.59 .....	1%	row
23,527.93 .....	5%	row

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\$282,659.16

-129,210.48 less commission received

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\$153,448.68 amount of suit

## Japan Civilians and Schools, 97B and 99B.

\$110,482.89

9,763.14

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\$120,246.03

-38,906.78 (12,426.58, acc't bal. + 26,480.20, Sales Discount)

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\$ 81,339.25 amount of suit

## Total of 98B, 96B, 97B and 99B.

Australia 98B .....	\$188,017.05
Military 96B .....	153,448.68
Japan Civilians 97B and Schools 99B ....	81,339.25

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Plaintiff's Total Claim \$422,804.98

## IV

**Trial Court Erred in Finding and Concluding  
Embezzlement, Fraud and Criminal Breach With-  
out Evidence of the Substantive Japanese Law  
on Subject**

The trial court was fully advised in a "Pretrial Brief on Conflicts of Laws Problems in Case," filed by counsel for Gates, appellant, on December 10, 1965 (Rec. 525-531, at 529) that:

"Colliers bases its counterclaim and defense on various acts of plaintiff (Gates) which took place in Japan. The law is clear that the law of the place of performance applies in these cases." (Rec. 529)

Since the law on the subject was so clearly presented in an article in 50 ALR 2d 254 entitled "What Law Governs in Determining Whether Facts and Circumstances Operate to Terminate, Breach, Rescind or Repudiate a Contract," appellant Gates quoted from said article (Rec. 529) as follows:

"The general rule is that unless a contrary intention is expressed in the contract, matters connected with the performance are regulated by the law prevailing at the place of performance. Questions as to whether there is an *effective termination, breach rescission, or repudiation of a contract* have been recognized as *matters of performance within the rule stated above. Where a contract is to be performed at more than one place, the law of the place in which the specific acts complained of as a breach or termination of the contract were done or to be done is controlling. The law of the place of performance of a contract has also been held*

to determine questions as to whether there is an excuse for nonperformance, such as illegality or impossibility of performance, whether a contractual right has been forfeited, and whether a contractual obligation has been discharged." (Emphasis ours)

In spite of the foregoing article and all the supporting cases cited in said article, the court found as shown in footnote 6.

In the first place the Japanese statute on embezzlement was not introduced in evidence. The substantive law of fraud of Japan as a basis for civil action for damages or as a defense was not introduced in evidence. After a clear warning by Gates that the law of Japan must be proven by Collier if it is to rely on the defense of fraud, Collier clearly disregarded said warning and did not prove said law. Gates, appellant, even notified Colliers in open court about the holding of this Court of Appeals in *Philip v. Macri*.

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6— "This court has already indicated orally from the bench and now states again that the three ledgers (Exs. B13-A, B and C) on their face show that as of May 13, 1960, Gates began embezzling monies due Collier under the first contract and continued such embezzlements until Bennett discharged him as Collier's representative in Japan and took over the business on May 2, 1962. The two weeks' notice provided by the contract was obviously intended to apply to a voluntary termination of the contract—without involving any such gross and criminal breach thereof, as found here. By May 2, 1962, Bennett had before him clear and positive proof of Gates' fraud. Bennett's letter of discharge on May 2 and his acts immediately thereafter constituted ample notice to Gates that the contracts were forthwith terminated, and for what reason. Nork's actions in Australia, likewise gave the same notice. Under the factual circumstances, the two weeks' notice referred to in the contract had no application. The breach by Gates was so substantial and fundamental as to completely destroy the personalized foundation of the contracts and negated any possibility of Gates being permitted to continue to run Collier's Japan and Australian operations. Failure to terminate promptly after discovery of Gates' fraud would have waived the breach. All Collier-Gates contracts were terminated as of May 2, 1962." (Rec. 696-697)

1958, 9 C.C.A., 261 F. 2d 945, 75 ALR 2d 523 (hereafter discussed).

The above article in 50 ALR 2d 254 well discusses the law but it is also stated in 16 Am. Jur. 25 as follows:

"The broad, uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself . . ." 16 Am. Jur. 2d 25.

See: *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 59 L. Ed. 1433, 35 S. Ct. 865; *Cuba R. Co. v. Crosby*, 222 U.S. 473, 56 L. Ed. 274, 32 S. Ct. 132; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511; *Scudder v. Union National Bank*, 91 U.S. 406, 23 L. Ed. 245; *Brown v. Ford Motor Co.*, (1931 C.C.A. 10, Okla.) 48 F. 2d 732; *Repsold v. New York Life Ins. Co.*, (1954, C.C.A. 7, Ill.) 216 F. 2d 479.

With relation to the problem of the proof of foreign laws Section 226-3 of the Revised Laws of Hawaii, 1955, provides as follows:

"Sec. 226-3. Laws of foreign country. The law of a jurisdiction other than those referred to in section 226-1 . . . (which refers to laws of other states and territories of the United States) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. (L. 1941, c. 110, s. 5; R. L. 1945, s. 9933.)"

Section 224-6 provides as follows:

"Sec. 224-6. Uniform proof of statutes. Printed books or pamphlets purporting on their face to be the session or other statutes of any of the United States or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority

of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of the Territory as prima facie evidence of such statutes. (L. 1927, c. 109, s. 1; R. L. 1935, s. 3837; R. L. 1945, s. 9885.)”

On the problem of the proof of foreign laws in *Walton v. Arabian American Oil Co.*, (1956 C.C.A. 2) 233 F. 2d 541, a case in which plaintiff was injured in an auto accident in Arabia and with relation to the basis of recovery, the law of negligence in Arabia, the court held:

“The general federal rule is that the law of a foreign country is a fact which must be proved. (Footnote cases: *Black Diamond S. S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 396-397, 69 S. Ct. 622; *Cuba R. Co. v. Crosby*, 222 U.S. 473, 479, 32 S. Ct. 132; *Liverpool and G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 9 S. Ct. 469.”

This Ninth Circuit Court in *Philip v. Macri*, (1958, C.C.A. 9) 261 F. 2d 945, 75 ALR 2d 523, a libel (defamation) action arising in Peru and governed by the law of Peru where the Peruvian law was not proven, held that:

“In this diversity case we must apply Washington rules of conflicts of law. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; *Sampson v. Channell*, 1 Cir., 1940, 110 F. 2d 754, 128 ALR 394. Washington follows the general rule that the substantive law applicable to an alleged tort is the law of the place where the tort was committed. *Restatement of the Law of Conflict of Laws*, Secs. 377, 378. *Richardson v. Pacific Power & Light Co.*, 1941, 11 Wash. 2d 288, 118 P. 2d 985; *Mountain v. Price*, 1944, 20 Wash. 2d 129, 146 P. 2d 327; *Maag v. Voykovich*,



1955, 46 Wash. 2d 302, 280 P. 2d 680. Here there is no question but that the alleged slander occurred in Peru, for the complaint alleges that the defamation was uttered, and Appellant's 'credit and reputation' injured, in Lima, Peru.

"We are thus faced with a situation where Appellant's cause of action arose in and should be governed by the law of Peru, but no Peruvian law is pleaded or proved. As seen above (Footnote 1, *supra*), there is a diversity of views on where this leaves a litigant. Does the cause of action fall for failure to allege an essential of the complaint, or does the forum assume the foreign law is the same as the law of the forum and apply it?

"We hold that the instant case is controlled by the principles set forth by Justice Holmes in *Cuba R. Co. v. Crosby*, 1912, 222 U.S. 473, 32 S. Ct. 132, 56 L. Ed. 274, 38 LRA NS 40. There, the Court was unwilling to assume that the law of Cuba (*locus delicti*) was the same as the common law. Thus, as the law of Cuba had not been pleaded or proved, the judgment entered for plaintiff in the trial court was reversed. Holmes pointed out that while it might be reasonable to presume that as between two common law countries, the common law of one was the same as that of another; that even as between two such countries there would be no such presumption where a statute was involved: i.e., a statute of one would not be presumed to be a statute of the other; and where both were not common law countries, the limits of the presumption would be narrower still.

"Where one country's judicial system is based on the Common Law and the other's on the Civil Law, both systems having been modified by statutory changes,

there is little to recommend the employment of a presumption that the law of one is the same as the law of the other.

"We do not presume that the law of defamation in Peru is the same as the law of defamation in the State of Washington."

Where one depends on a foreign law as a defense, if the foreign law is not proven, such a defense is unavailable to defendant. *Askanian v. Dostumian*, (1809) 174 Mass. 328, 54 N.E. 845; *Western U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

And where one relies on a foreign law to recover as Colliers does in its counterclaim, upon failure of proof of foreign law, the case is dismissed. *Cuba R. Co. v. Crosby*, 222 S. Ct. 473, 32 S. Ct. 132; *Walton v. Arabian American Oil Co.*, 233 F. 2d 541. Defendant's counterclaim based on embezzlement, fraud and criminal breach should be forthwith dismissed. Its defense based on fraud should be denied. In these cases as well as in this Court's above quoted *Philip v. Macri* (*supra*), dismissal without a remand to the lower court was the final order. It isn't that Collier didn't know, but where it was warned of this court's decision in *Philip v. Macri*, Collier must take the consequences of its wilful disregard of the opinions of this court.

Without a defense of fraud, Colliers is clearly without a defense under Count Four of the amended complaint. (Rec. 365) Count Four covered Japanese Civilians and Schools (97B and 99B accounts).

Colliers has always been without a defense under Count Two (Australia 98B) and Count Three (Military 96B)

because Collier has admitted that Gates is not guilty of any alleged fraudulent conduct in Australia or under the military portion of the contracts.

## V

### **Trial Court Erred in Finding That the Tokyo District Court Pro-Tem Decree Was Fraudulently Obtained**

With relation to the Tokyo District Court order, the trial court found as quoted in the footnote 7.

The Tokyo District Court Order is admitted by Collier in its sworn answer =16 filed November 10, 1964. (Rec. 169) The gist of the order is stated in interrogatory =16. (Rec. 120) The order was received in evidence as Court's Exhibit A.

It is submitted that the trial court's finding of "fraudulent acts of embezzlement" in this respect is again based on the laws of Japan regarding embezzlement and the substantive law of fraud. The trial court's finding is therefore subject to the same objection that there was no proof of the Japanese law, as argued herein in Paragraph IV

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7— "... The court finds the defendant's claim that the action in Japan was brought by Gates for the deliberate purpose of injuring Collier and was without any foundation in truth, in fact, or in law, is true. The court has reviewed the affidavit upon which Gates made his application for the restraining order and after hearing all of the evidence, including the testimony of Gates himself, the court finds that Gates' claims in his affidavit of June 8, 1962, that he was still the representative in Japan of Collier, that the board of directors had taken no action to discharge him as representative, and that Bennett misunderstood Gates' explanation of Japanese business on May 2, 1962, and that the board of directors did not issue a resolution to discharge Gates as a representative in Japan was false, and Gates knew it was false at the time he made the statement. At the time, Gates knew that the board of directors had already taken away all powers from him. The court finds that the Japanese court action was but part of Gates' wilful attempt to implement his fraudulent acts of embezzlement and to postpone the day of reckoning."

above. Said arguments are hereby incorporated by reference.

Furthermore it is elementary that "a judgment of a sister state cannot be challenged on the ground that it was obtained by false testimony or perjury." 55 ALR 2d 702. *Littlefield v. Payner*, 111 Kan. 201, 206 Pac. 114; *McDonald v. Drew*, 64 N.H. 547, 15 Atl. 148; *Crescent Hat Co. v. Chizik*, 223 N.C. 371, 26 S.E. 2d 871; *Hecht v. Alton*, (Texas) 59 S.W. 2d 428; *Allard v. La Plaia*, 147 Wash. 497, 266 Pac. 688.

It is further stated in said authority that. "Fraud in the transaction upon which the action is based is not fraud available as a defense against a judgment in that action when sued upon in a sister state." 55 ALR 2d 704. See: *Berman v. Diamond*, (1952 D.C.) 196 F. 2d 590; *Mahoney v. State Ins. Co.*, (1907) 133 Iowa 570, 110 N.W. 1041; *Lorejoy v. Ashworth*, 94 N.H. 8, 45 A. 2d 218.

The Tokyo Court order was entered on June 2, 1962 and it is still outstanding. (Rec. 120 and 169) The trial court's amended decision was filed on July 8, 1966. (Rec. 688) If it was fraudulently obtained Collier's should have voided the order in the Tokyo Court at least after this suit was started on July 9, 1964 and before trial was started on April 18, 1966. (Tr. 1)

Furthermore Collier's counterclaim nowhere alleged that the Tokyo Court Order was obtained by fraud. Collier's counterclaim only alleged that, "The value of the stock merchandise stolen, dishonestly retained and converted by plaintiff to his own use amounted to over \$46,073." (Rec. 382) Gates brought out the fact of the issuance of the Tokyo Court Order in the trial of the cause

while questioning Mr. Nork (Tr. 179) to show that the sales by Gates of 251 sets after May 2, 1962, was under the Tokyo Court Order and it was proper. Colliers in its answer to the interrogatory regarding the order did not claim fraud in obtaining the order (Rec. 170) and admitted that it was Gates' Tokyo attorney who obtained said order. It is required by Rule 9(b) of the Federal Rules of Civil Procedure that "all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Colliers not only did not allege fraud but did not prove the circumstances surrounding the issuance of the order by the Toyko Court.

The court's finding that Gates misrepresented to the Tokyo court as follows:

"The court has reviewed the affidavit upon which Gates made his application for the restraining order—that he was still representative in Japan of Collier, that the board of directors had taken no such action—and that the board of directors did not issue a resolution to discharge Gates as a representative in Japan was false and Gates knew it was false at the time he made the statement. At the time, Gates knew that the board of directors had already taken away all powers from him." (Rec. 707-708)

is not correct in that in said affidavit Gates was speaking only of the "*registered representative*" with the Japanese government. (Def's. Ex. G-1 in Evidence) A careful examination of the minutes of the meeting of April 26, 1962, does not reveal the revocation of such "*registered representative*" registration was ever authorized. A copy of said resolution appears on page 435 of the Record. It merely



removes Gates as vice president and supervisor of the Asiatic Division. Bennett in his letter of May 2, 1965, doesn't follow the corporate resolution. (Rec. 437) The claim of Colliers was subject to the many complicated defenses stated in this suit. The trial court's finding of "falsity" is not supported by the evidence in any manner.

Therefore the 251 sets of the encyclopedias and the other books sold after the issuance of the court order were sold under a valid and properly issued court order.

## VI

### **Assuming That Appellant's Arguments in Paragraphs I, II, III, IV and V of This Brief Are Untenable, Collier's Evidence Was Insufficient to Sustain Court's Judgment on Counterclaim and Colliers Did Not Prove Any Defense of Fraud.**

Assuming that Appellant's arguments in Paragraphs I, II, III, IV and V are untenable to this Court, Appellant still maintains that Colliers cannot recover on its counterclaims based on fraud and Colliers did not establish its defense of fraud:

#### **A.—96B (Military), 98B (Australia) and 97B and 99B (Japanese Civilian and Schools) Were Divisible Portions of Contracts; Fraud If Any Concerned 97B Only.**

At this point it will be helpful to this court to advance Appellant's arguments regarding divisibility of the Contracts of April, 1960 (Plf's. Ex. 1 in Evidence) and September, 1961. (Plf's. Ex. 2 in Evidence)

Prior to April 15, 1960, there were two separate contracts, Plaintiff's Ex. 5 (Japanese Civilian) and Ex. 4 (Military). Each was a separate operation in that Ex. 4 (Military) was a U.S. Dollar operation and Ex. 5 (Japanese Civilian) was a Japanese Yen operation. After April 15, 1960, these two operations were put into one contract (Plf's. Ex. 1 in Evidence) but because the two operations were still operated on different currencies, U.S. Dollars and Japanese Yen, they were kept separate operations. Accounts 96B and 97B were separate in sales personnel in that Japanese salesmen were used and the sales were in Japanese Yen (Def's. Ex. B-13 ABC in Evidence); the contract forms were entirely different (Plf's. Ex. 123 in Evidence); collections were handled separately and banked separately (Plf's. Ex. 9 in Evidence) (Plf's. Ex. 6 in Evidence); the military 96B was allowed an "Imprest Fund" while 97B did not have such a fund (Plf's. Ex. 9 in Evidence); 97B remittances were by way of licenses and drafts (Plf's. Exs. 11, 12, 14, 32 in Evidence); the accounting of the 97B and 96B was kept entirely separate (Plf's. Exs. 75, 108, 120, 121); 97B orders were filled from Tokyo but 96B orders were sent out parcel post to military personnel; 97B term orders were allowed a 12-month period of payment while 96B term orders were allowed 24-month period of payment (Plf's. Ex. 9 in Evidence) and Colliers did not pay any Japanese income taxes on its 96B military operation while it paid taxes on the 97B operations. (Plf's. Ex. 106 in Evidence) In other words the 97B and 96B accounts were as separate as the two separate operations under Plf's. Exs. 4 and 5 aforementioned.

Witness Nork testified as shown in footnote 8.

8— "Q. Paragraph 1 reads: 'Branch number assigned is No. 96.' That was not followed?

"A. That was not followed.

"Q. Why?

"A. Because we realized that we could not put all of this in one operation. That is to say, we could not mix up the military business together with the yen business. So it had to be separated. And we, therefore, had to create three different numbers, one for the schools and library sales, which was 99; the yen accounts were 97; and the military remained 96.

"So that is why this could not be followed.

"Q. Now, let's get to the school accounts. The school accounts were books sold to Japanese schools?

"A. Schools and libraries.

"Q. And these bore a special price?

"A. That's right.

"Q. But they were included with the Japanese sales in the monetary handling?

"A. In the banking.

"Q. In the banking?

"A. That's right, but not in the bookkeeping.

"Q. These were, Account No. 96 was the military account—right?

"A. Right.

"Q. What is the 'B' for?

"A. That means 'Branch.' We use that term in the States, on the Mainland, rather. 91-B would be Atlanta; 2-B is Chicago; 3, and so forth.

"Q. Now, with relation to 96, this was operated entirely separate and apart from the two Japanese yen accounts, the Japanese schools and Japanese civilians, separately?

"MR. BROWN: Your Honor, I object to the question on the ground that it isn't clear what he means by separate. Separate in what sense?

"THE COURT: Rephrase your question.

"Q. (By Mr. Kashiwa) For example, in the remittance of money, they were handled separately, weren't they?

"THE COURT: These three accounts, is that what you are asking?

"MR. KASHIWA: Yes.

"Q. (By Mr. Kashiwa) No. 96 was entirely separate from the civilian, the Japanese civilian?

"A. That's right." (Tr. 123)

With relation to the Australian contract the trial court found as follows:

“Towards the end of 1961, Collier and Gates decided to open up a Collier branch in Australia, and did so in January, 1962. However, as to the Australian operation, it was agreed that Gates would act as an independent contractor and not as an employee of Collier and would be entitled to a 36% basic sales commission. Collier would open its own branch there to handle only the cash accounts receivable and the inventory of books, all sales to be under the control of Gates.” (Rec. 692)

It was not only a separate contract, it was an entirely separate operation.

In 17 Am. Jur. 2d 758, with relation to divisible contracts, it is stated:

“No formula has been devised which furnishes a test for determining in all cases what contracts are severable and what are entire. The primary criterion for determining the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question. Whether a contract is entire or divisible cannot be determined by a single term, phrase, or sentence, even though it is broad enough to include such meaning, unless, throughout the whole agreement and from the surrounding circumstances, it definitely appears either that it was or that it was not the intention of the parties that the contract should be entire and indivisible. *If, in this respect, the parties themselves have placed a certain construction on the contract, that is to be con-*

*sidered, and acts of the parties in treating the contract as entire or severable have an important bearing on its construction. A factor in determining whether a contract is entire or severable is whether the parties reached an agreement regarding the various items as a whole or whether the agreement was reached by regarding each item as a unit. A contract to do several things at several times is divisible in its nature if there is no manifestation of a contrary intent."*

and at page 760, it is further stated:

"In construing a contract to determine whether it is entire or severable, many of the courts have regarded the singleness or apportionability of the consideration as an important test—that is, if the consideration is single, the contract is entire, but if the consideration is expressly or by necessary implication apportioned, the contract is severable. Thus, where several things are to be done under a contract, and the money consideration to be paid is apportioned to each of the items, the contract is ordinarily regarded as severable."

See: *Pollak v. Brush Elect. Asso.*, 128 U.S. 446, 9 S. Ct. 119; *Trainman v. Pappaport*, (C.C.A. 3) 41 F. 2d 336, 71 ALR 475; *Hutchison v. New York & P. Co.*, (C.C.A. 4) 229 Fed. 510.

It is submitted that 96-B (Military), 98-B (Australia) and 97-B and 99-B (Japanese Civilian and Schools) were all divisible portions. In fact the Australian contract was a separate contract as the court held.



The fact that Appellant was an independent contractor further adds to the above argument of divisibility. Appellant argued below" that Appellant was an independent contractor as to all these three segments of the contract. 96B, 97B and 98B.

In 2 C.J.S. 1027 it is stated:

"An independent contractor and an agent are not always easy to distinguish, and there is no uniform criterion by which they may be differentiated. Generally, however, the relations are distinguished by the extent of the control which the employer exercises over the employee in the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which

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9— "The Collier-Gates & Son Corporation contract of May 1, 1959 (Plf's. Ex. 4 in Evidence) in describing the relationship of the parties in its military books sales contract specifically provided as follows:

*'16. Nothing in this agreement shall be deemed to constitute either Gates or any of its agents or employees as an agent, employee or representative of Collier.'*

In Colliers 'Procedure for Opening Tokyo Branch, Japan' written by S. J. Nork it is stated:

*'Salesmen—Independent Contractors.* The law governing free lance is basically very similar to that in the United States in that a free lance salesman dealing strictly on a commission will be considered an *independent contractor*, and the company would not be liable to third parties as employer.'

In the April, 1960, and September, 1961, contracts paragraph 8 provided as follows:

*'8. All expenses incurred in connection with the operation of the Japan division of Collier, including the compensation of sales personnel, clerical personnel, office rent, warehouse and storage charges, shall be payable by Gates.*

*'In the event Collier shall be charged with or become liable for any of the operating expenses of the Japan division of Collier as hereinabove set forth, it shall have the right to deduct any moneys paid by it on account thereof from any moneys that may be payable by Collier to Gates under this agreement.'*" (Rec. 516)

it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, and he, and not his employer, is responsible for his own acts and contracts, and the relation is not changed by the employer's reservation of the right of supervision and approval."

See: *United States v. Silk*, 331 U.S. 704; *Bond v. Harrell*, 13 Wisc. 2d 369, 108 N.W. 2d 552; *Cannon v. Time, Inc.*, 115 F. 2d 423; 75 ALR 2d 725; 126 ALR 1120; 27 Am. Jur. 485 and 98 ALR 2d 336.

Under these authorities Gates was clearly an independent contractor.

There being three divisible portions to the contract, and Colliers having admitted that the alleged fraud, if any, concerned only 97B portion of the contract, it is submitted that Colliers did not have a defense to plaintiff's suit on the 96B (military) and 98B (Australia) portion of the contract. These contracts were only terminated by the notice of termination given after the September 28, 1962, meeting of Collier's Board of Directors (Plf's. Ex. 89 in Evidence) two weeks prior to October 16, 1962. Appellant's figures presented in Exhibit CC in appendix of this brief are based on a termination as of October 16, 1962.

As for the 97B portions of the contract, Appellant maintains that Colliers failed in its proof in the particulars listed in Subparagraphs B, C, D and E to follow.

**B.—Collier's Exhibits B-13A, B and C Were Only Book Entries;  
No Conversion Was Proven, Therefore No Action in Fraud  
May Be Maintained.**

This argument is directed to the 97B claim only in that Colliers admits that the alleged fraud was only in the 97B portion.

As heretofore argued, the Criminal Statute of Japan on Embezzlement was not introduced in evidence. There being no embezzlement statute proven, Colliers completely failed in its proof of conversion of any funds by Appellant. Appellant came into possession of the funds lawfully after the sale of the books with full consent of Colliers. It will be shown that Gates did with said funds exactly what he was ordered to do in writing by Collier. So where is the conversion of funds?

First of all, as it is well stated in 26 Am. Jur. 2d 609:

"The mere making of false entries in books of accounts is not sufficient evidence of an act of conversion constituent to the crime of embezzlement. . . ."

And as stated in 17 (A) C.J.S., 494, Section 467:

"As a general rule, forfeitures are not favored either in law or in equity, and before a forfeiture will be enforced the right thereto must clearly appear to have arisen. The party insisting on the forfeiture must comply strictly with all contract requirements and with conditions authorizing the forfeiture. So where forfeiture is dependent on the making of a demand and failure to comply with the demand, the failure to make a proper, specific, and reasonable demand is fatal to the enforcement of the forfeiture by a court of law or equity. Also, the party claiming the benefit of a contract provision for forfeiture must

*not be himself in default, and he must be free from blame for the other party's default. A party will not be permitted to take advantage of his own independent act to work a forfeiture of his own contract. A forfeiture cannot be had on grounds other than those specified in the contract."*

It is important to note that Colliers did not supply Gates with any funds with which to start the Tokyo office. But out of the sale of each set of books for \$269.50, Gates was allowed his 34% to pay his salespeople and send \$172.50 to New York. If he gave a 5% discount to the customer, there was nothing left for him. Plaintiff's Ex. 111 in Evidence well explains this on a 100 set basis. The arithmetic quoted in said Exhibit 111 is as follows:

Total selling value	\$26,950.00
34 % commission	-8,483.00
	<hr/>
	\$18,467.00
\$172.50 per set remittance	-17,250.00
	<hr/>
	\$ 1,217.00
Discount	1,200.00
	<hr/>
Left over in Tokyo	\$ 17.00

The above letter from Gates to witness Nork was dated October 16, 1960, so Colliers well knew that Gates couldn't continue the Tokyo office because there were term sales as well as cash sales unless he utilized the following two written authorizations given by Collier:

1) "Terms: *Full amount of invoice* covering cost of books, payable in U.S. Dollars *in twelve (12) equal monthly installments*, starting thirty (30) days from the time this shipment of books has cleared through customs into Japan." (Rec. 130, 132) (Plf's. Exs. 24, 26 in Evidence) (Emphasis ours) (This was also repeated in the Japanese Import Licenses).

2) "After the Tokyo Bank Account has sufficient yen deposits, the salespeople paid on yen accounts will be paid in yen from this account (Tokyo yen account)." Plf's. Ex. 9 in Evidence at page 3.

The first authorization (1) permitted him to remit in 12 equal monthly installments the full amount of the invoices. No remittance was required on a set-for-set basis. So if there were a cash sale, payment therefor may be made in 12 equal installments so that under (2) above the 34% commission (\$84.83) under term yen sales where the down payment was for example only \$10 may be paid because Colliers did not supply Appellant with an "Imprest fund" for Tokyo yen sales. (1) above supplied the necessary "slack" and (2) contemplated such a "slack" because as stated in Plaintiff's Ex. 111 in Evidence nothing remained out of each \$269.50 after the 34% Commission was paid, the \$172.50 remittance sent to New York and a discount given.

In other words the "slack" was provided for in writing by Colliers. It is submitted that where Colliers consented to the "slack" in writing, it cannot accuse Gates of fraud because it is elementary that there is no conversion when one consents.

The evidence in this case further shows the Japanese yen remittances (Rec. 139-146) from appellant in Tokyo



to Colliers in New York converted into U.S. Dollars as shown in footnote 10.

In other words in accordance with the invoices and the import licenses the amounts due were sent in accordance with (1) abovequoted. The sums were sent in lump sums, without earmarking the amounts remitted set by set. Collier was therefore concerned with the total remittance and this was to be on a 12-month equal payment basis. Each of the invoices were met under (1) above exactly in accordance with (1). Certainly there was a "slack" when cash sales remittances were not sent immediately but when Colliers agreed to 12 months equal payment of its total monies amounts, Colliers cannot object.

10—	July 1960	\$1,000
	September 1960	6,000
	October 1960	5,500
	November 1960	5,000
	December 1960	9,500
	January 1961	\$16,500
	February 1961	10,500
	March 1961	17,500
	April 1961	14,000
	May 1961	15,500
	June 1961	17,500
	July 1961	18,000
	August 1961	9,500
	September 1961	11,250
	October 1961	10,500
	November 1961	10,000
	December 1961	1,000
	January 1962	\$5,500
	February 1962	13,200
	March 1962	7,182.50
	Total	<u>\$204,632.50</u>

And payments to Gates of the 34% (\$84.83) commission under term yen sales where down payments were less than \$84.83 under (2) above, were certainly with Collier's written consent.

Payment for Japanese taxes were also made out of the already drained Tokyo yen account. (Plf's. Ex. 106 in Evidence) Transportation Expenses for the Yokohama to Tokyo haul of books were also paid. (Plf's. Ex. 115 in Evidence) Colliers permitted payment of Gates airline tickets from said account. (Plf's. Ex. 84 in Evidence) Colliers knew that these excessive drains on the yen accounts also existed. How was Gates to pay these amounts when Colliers itself knew that the Tokyo Yen Account existed by reason of the "slack." Colliers gave Gates authority under (1) above quoted and he used it.

And finally Gates was appointed to operate the Tokyo office with a broad written general power of attorney. (Plf's. Ex. 82 in Evidence) In the absence of an embezzlement statute, one given such a broad power of attorney can never be held for conversion of funds where he is directed by other documents to do as he did.

Furthermore Collier's case is further weakened in that there was debtor and creditor relationship between Gates and Collier. The trial court found that there was no debtor-creditor relationship between Colliers and Gates but it is submitted that such finding is completely contrary to the evidence.

Witness Simon J. Nork testified as shown in the footnote 11.

For the 96B military accounts there was an "impress fund" but for the 97B Japanese Civilian accounts no impress fund was provided. In other words on a term sale in Japanese yen, where there was a down payment of the yen equivalent of \$10.00, Colliers immediately owed Gates (\$84.83-10.00) \$74.83. There were 1,404 term sales or a total of \$119,101.32 (\$84.83 x 1,404) was involved. So

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11—"Q. Now, will you refer to paragraph 5?

"THE COURT: Of Exhibit 1?

"MR. KASHIWA: Yes, paragraph 5.

"Q. (Continuing) Paragraph 5 with relation to the 34 per cent commission. All right, now, if there was a \$269.00 order of encyclopedias, and there was a \$10.00 down payment, the first payment, the first payment on that set, what was due Gates?

"A. The difference between the \$10.00 that he retained and the 34 percent that he was supposed to receive, which will depend—

"Q. Assuming that it is \$269.50, the 34 percent was about \$84.00, am I right?

"A. Yes.

"Q. And so with \$10.00 down, there would be about \$74.00 owing to Gates?

"A. Correct.

"Q. That is the way it was operated?

"A. That is the way it is operated." (Tr. 89-90).

And he further stated:

"Q. Yes. And also you did testify that, for example, if there was a term sale with less than 34 percent payment, for example, 10 percent payment, then Collier would owe Gates the balance?

"A. That's right.

"Q. In other words, there was a lot of debit and credit going on?

"A. Correct. That will be explained by our accountant.

"Q. This was quite complicated, am I right?

"A. Correct." (Tr. 149-150).

these term sales in Yen immediately created a creditor-debtor relationship.

A further debtor-creditor relationship was created in New York in that with relation to the \$172.50 sent to New York for each set sold under the import licenses the \$172.50 was made up of the following:

Collier's Right	
40.5%	\$118.00
Gates' Rights	
12.5%	34.00
7%	17.00
1%	3.00
	<hr/>
	\$172.00

In other words some of Gates' own funds were sent to New York. (Tr. 386) With the debtor-creditor relationship in existence there was no embezzlement proven. Neither was fraud proven.

In 18 Am. Jur. 580, it is stated:

"Sec. 20. Debtor and Creditor Relation.—Generally, when dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement. For example, a laundry agent who is paid by commissions and who is charged with the entire amount of laundry work done stands in the relation of debtor to the laundry company. He holds money collected in such capacity and cannot be convicted of embezzlement. Similarly, a contract for the sale of money creates a relation of debtor and creditor, and not one of trust, so that a failure to pay over the money does not constitute embezzlement.

“Ordinarily, whether the relation of debtor and creditor exists depends upon the facts of the particular case. Where a principal acquiesces in his agent’s practice of depositing rents collected, on his general account, and of treating the deposits as his own, such a course of dealings may divest the principal of his specific property in the deposits and establish the relation of creditor and debtor between him and his agent.”

See also: *MacGray v. Bennett*, 250 N.C. 707, 110 S.E. 2d 324; 26 Am. Jur. 2d 567; *U. S. v. Mason*, 218 U.S. 517, 31 S. Ct. 28.

It is submitted that therefore under the circumstances in this case there was no conversion proven. There was no fraud proven.

**C.—Colliers Failed to Prove Alleged Fraud Proximately Caused Pecuniary Losses.**

One of the most elementary rules of law in a civil action for damages based on fraud is that the complainant must prove “actual pecuniary loss” suffered as a proximate cause of the alleged fraud.

In the recent case of *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, (1959, C.C.A. 2, N.Y.) 265 F. 2d 418, wherein the court held:

“(3, 4) The New York decisions make it plain that the recovery allowable for fraud is not punitive in nature. *The plaintiff is entitled to be indemnified only for actual pecuniary loss.* *Hanlon v. Macfadden Publications*, 1951, 302 N.Y. 502, 511, 99 N.E. 2d 546, 24 ALR 2d 733; *Ross v. Preston*, 1944, 292 N.Y. 433, 436, 55 N.E. 2d 490; *Sager v. Friedman*, 1936, 270 N.Y. 472, 480-481, 1 N.E. 2d 971; see also *Reno v. Bull*,



1919, 226 N.Y. 546, 553, 14 N.E. 144 (even possible profits may not be recovered). We therefore find no merit in plaintiff's principal contention. (Emphasis ours)

"(5) The next question raised by this appeal is who has the burden of establishing plaintiff's actual pecuniary loss. This question is also governed by the law of New York. *Palmer v. Hoffman*, 1943, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645; *Sampson v. Channell*, 1 Cir., 1940, 110 F. 2d 754, 128 ALR 394, certiorari denied 310 U.S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415.

"(6) Judge Dimock dismissed the plaintiff's action at the close of its case on the ground that it had failed to prove damages. We think Judge Dimock was correct. Under the law of New York plaintiff has the burden of establishing that the amount it paid out on the ten false bills exceeded any sum or sums which it may have received on account of this transaction. Merely proving that the money was paid out in reliance on false bills of lading is only part of the story. *Sager v. Friedman*, supra, 270 N.Y. at page 482, 1 N.E. 2d at page 974; *Deutsch v. Roy*, 1st Dept. 1934, 239 App. Div. 714, 268 N.Y.S. 606, affirmed 1935, 269 N.Y. 508, 199 N.E. 510; *Woolson v. Waite*, 158 Wisc. 764, 768, 286 N.Y.S. 619, affirmed 4th Dept. 1936, 247 App. Div. 855, 286 N.Y.S. 624. Here the record does not show that the plaintiff suffered any actual pecuniary loss."

In *Automatic Truck Loader Corporation v. City of New York*, (1945) 57 N.Y.S. 2d 295, the court held:

"(15) There is no basis for awarding to the plaintiffs what they would have obtained if the representations were true. *Reno v. Bull*, 226 N.Y. 546, 124

N.E. 144, was an action brought by the purchaser of stock for damages resulting from false representations by the seller. The court said, per McLaughlin, J., 226 N.Y. at pages 552, 553. 124 N.E. at page 146: "The rule as to the measure of damages is not the one to be applied. The court said to the jury that if the plaintiff were entitled to recover, then he should be awarded "the difference between the value of the stock at the time it was sold to him \* \* \* and the value of the stock as it would have been at that time if the representations were true." The purpose of an action for deceit is to indemnify the party injured. *All elements of profit are excluded. The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong.*' " (Emphasis ours)

The question therefore is whether Colliers proved "*actual pecuniary loss sustained as a direct result of the wrong.*"

First of all the alleged fraud was only in the 97B (Japan Civilian) phase of the contracts. No fraud of any nature was proven in the 99B (Japan schools), 96B (Military) and 98B (Australian) phases of the contracts. Therefore without any fraud in these three phases (99B, 96B and 98B) of the contracts there can be no damages caused by fraud. The trial court erred in allowing damages on the counterclaim to Colliers under the 99B and 96B phases of the contracts. The trial court found as follows:

"His calculations (Collier's Accountant, Rabino-witz) made on a basis most favorable to Gates, showed that out of a gross sales of over \$1,069,549 Gates' liability under the 12.5% clause for 96B (military) and 97B (Japan Civilian) accounts, as well as the 10% liability clause on the 99B Japan schools accounts was

\$185,822. Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier \$169,013 under the contracts."

The figure \$169,013 broken down (Def's. Ex. R. 48 in Evid.) was as follows:

96B (Military)	\$54,366
99B (Japan Schools)	27,052
97B (Japan Civilians)	90,150
98B (Australia)	( 2,555)
(this was a plus figure)	

It is submitted that the court erred in allowing for 96B \$54,366 and for 99B \$27,052. The 98B figure of only \$2,555, although a plus figure was in error in that it should have been plus \$351,699.83. (See Exhibit CC, appendix herein.)

As for the 97B (Japan Civilian) figure of \$90,150 the trial court was in complete error in that only losses proximately caused by the alleged fraud may be assessed against Appellant. The alleged fraud committed by Collier's Exhibit B-13 A, B and C (as shown by Argument B above) did not cause any loss or damage to Colliers. The whole plan of the Tokyo office set up, started without any funds and requiring remittance of practically all remaining out of the \$269.50 gross sales price, after the 34% commission is paid and 5% commission given revolved about these two clauses:

1) "Terms: Full amount of invoice covering cost of books payable in U.S. Dollars in twelve (12) equal monthly installments, starting thirty (30) days from time this shipment of books has cleared through customs into Japan." (Rec. 130, 132)

2) "After the Tokyo Bank Account has sufficient yen deposits, the sales people paid on yen accounts will be paid in yen from this account." (Plt's. Ex. 9 in Evidence)

As argued fully in Paragraph B above Colliers agreed by (1) above to a "slack" in the remittance of funds and Colliers agreed by (2) that said "slacked" funds may be used to pay the term yen sale 34% commission which Colliers owed the salesman if the down payment was only \$10.00 for example. Nothing was lost by Colliers by the "slack." It even consented to the "slack." And payment of what Colliers owed already certainly was not a "pecuniary loss." Colliers wanted the salesman to be paid by using funds caused by the "slack." Colliers consented in writing by (1) and (2) above. How could it represent to this court that any pecuniary losses were incurred?

Being unable to prove a loss proximately caused by the alleged fraud, if any, Colliers shifted in midstream of its case to proving contractual liability under the 12½% and 10% clauses of Plaintiff's Exhibits 1 and 2 in Evidence. As it will be shown in Paragraph D to follow, Colliers is precluded from doing this in that it elected to sue in tort and it may not now seek to restore a rescinded contract and bring to life what is considered "annihilated."

**D.—Colliers Rescinded Its Contract of September, 1961 and Cannot Sue for Future Liabilities to Arise under the Said Contract.**

As for the April 15, 1960, contract (Plf's. Ex. 1 in Evidence) the evidence is that Colliers was fully paid for in its 97B portion in that Colliers paid the 12½% commission thereunder in the sum of \$18,834.24. (Tr. 386)

The first payment was for \$9,353.25 for sales numbers 97B 1-303. (Tr. 386) The last payment is evidenced by Plaintiff's Ex. 93 in Evidence showing payment of \$9,480.99 for accounts 304 to 607. Plaintiff's Ex. 75 in Evidence, a document prepared by Colliers, shows only 607 sales by P. F. Collier & Son Corp. It shows no loss to P. F. Collier & Son Corp. (See also Plf's. Ex. 121 in Evidence) so a full 12½% was paid. It is submitted that since there was no loss, no action for fraud could be maintained on said contract of April 15, 1960. *Toho Bussan Kaisha, Ltd. v. American President Lines*, (1959, C.C.A. 2) 265 F. 2d 418.

As for the September, 1961, contract (Plf's. Ex. 2 in Evidence) Colliers chose to terminate the contract by a written notice (assuming for this argument that it was a valid notice). Colliers thereby rescinded the contract and it cannot again enforce any liabilities arising under the contract subsequent to May 2, 1962. Election to sue in tort for the alleged wrong done under Colliers' Exhibit B-13 A, B and C covering the period May, 1960 to May, 1962, also meant a rescission of the contract of September, 1961. The contract is "annihilated" by the rescission and Colliers may not enforce any rights under the contract under any assumption that the contract was in existence.

In 25 Am. Jur. 2d 674 under the topic "Election of Remedies," with relation to the effect of election it is stated:

"Where a party, with knowledge of the facts, and in the absence of fraud or imposition makes an election between inconsistent remedies, and the one chosen by him is not a mistaken remedy, his election is final,



conclusive and irrevocable, and constitutes an absolute bar to any action, suit, or proceeding inconsistent with that asserted by the election."

*United States v. Oregon Lumber Co.*, (On Certificate to Sup. Ct. from 9 C.C.A.) 260 U.S. 290, 43 S. Ct. 100;

*Karapetian v. Carolan*, 83 Cal. App. 2d 344, 188 P. 2d 809, 1 ALR 2d 1075;

*Holscher v. Ferry*, 131 Colo. 190, 280 P. 2d 655;

*Davidson v. McKown*, 157 Kan. 217, 139 P. 2d 424, 6 ALR 2d 1;

*Labor Hall Ass'n v. Danielsen*, 24 Wash. 2d 75, 163 P. 2d 167, 161 ALR 1079;

*Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge*, (D.C. Wash.) 91 F. Supp. 596, aff'd (9 C.C.A.) 188 F. 2d 356, cert. den. 342 U.S. 851, 72 S. Ct. 39;

*Bankers Trust Co. v. Pacific Employers Inc. Co.*, (C.C. A. 9, Nev.) 282 F. 2d 106, cert. den. 368 U.S. 822, 82 S. Ct. 41;

*White Oak Coal Co. v. United States*, (C.C.A. 4) 15 F. 2d 474, cert. den. 273 U.S. 756, 47 S. Ct. 459.

The trial court in its original decision of June 21, 1946, well aware of this rule of rescission held at page 10 of said decision as follows:

"The breach by Gates was so substantial and fundamental as to completely negate and destroy the objects of the contract. Failure to *rescind* promptly after discovery of plaintiff's fraud would have waived the breach. The contracts were *rescinded* and terminated as of May 2, 1962." (Rec. 635)

The court in its amended decision after Appellant filed its motion for new trial (Rec. 658) changed the above paragraph so that the first "rescind" was changed to "terminate" and the second rescinded was eliminated (Rec. 697). The trial court attempted to correct its error but it is submitted that "termination" is rescission under the circumstances of this case. This Court of Appeals in *Boeing Airplane Co. v. Aeronautical Industrial District Lodge*, (9 C.C.A., 1951) 188 F. 2d 357 held:

"We have examined the entire record and are satisfied that the learned district judge correctly concluded, in the light of the terms of the contract and all the circumstances of the case that at the time immediately after the strike began when Boeing elected to terminate the contract the union had been guilty of a material breach which fell short of abandonment or total repudiation of the contract. *The power of termination which accuses the wronged party as a result of such a breach and was exercised by Boeing in this case is a right of rescission which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract.*" (Emphasis ours)

The Ninth Circuit Court completely approved the lower court's opinion in 91 F. Supp. 596, 609. The lower court's opinion is well written.

It is submitted that by the very nature of the September, 1961, contract, Plaintiff's Exhibit 2 in Evidence, under paragraph 10 thereof in which Gates guaranteed the collectability of term sales (the 12½% and 10% clause) the collectability of the accounts was to be determined for the 97B accounts in the following manner:

"It was contemplated by both parties that there might be losses on account of bad accounts—Collier expecting a loss of 12.5% on the total amount of accepted orders. In order to induce good, collectible business, on 24-month contracts a monthly analysis would be made 30 months from the month in which the business was reported, and on a 12-month contract—15 months. If a contract was not paid in full at the end of either 30 or 15 months, it was classified as a loss. If the losses were below 12.5%, Gates was to get the difference between the 12.5% and the actual percentage loss ratio incurred. If the actual loss ratio exceeded 12.5%, Gates was to pay Collier the difference between 12.5% and the actual percentage of loss over that figure." (Rec. 627-628)

In May, 1962, only eight months of the allowed 15 months period had passed under the 97B contract and only eight months of the allowed 30 months period had passed under the 96B contract. Because of this 12½% guarantee clause the contract was not one forthwith terminable. Colliers was bound to allow the respective 15 months period or the 30 months period to go by before determining the guaranteed amount. Colliers had a right to do this but by its early termination, it rescinded the contract and Appellant cannot be held liable for obligations to arise in the future under the rescinded contract.

The trial court followed witness Rabinowitz's testimony and held as follows:

"As indicated above, defendant had an exhaustive study of all of the Gates' Japan and Australian accounts made by Rabinowitz. In his calculations, Rabinowitz gave Gates full credit for all sales up to and

including May 2, as if Gates had not committed fraud and embezzlement. *His calculations, made on a basis most favorable to Gates, showed that out of gross sales of over \$1,069,549, Gates liability under the 12.5% clause for 96-B Military and 97-B-Japan Civilian accounts, as well as the 10% liability clause on 99-B Japan schools accounts was \$185,822. Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier \$169,013 under the contracts."*

In other words the trial court did the very thing this court prohibited in the Boeing case. One cannot terminate a contract of the nature in this case and later say that it did not rescind the contract.

The trial court erred in deciding that there was \$169,013 due under the 12½% and 10% clause. The figure \$169,013 is based on Collier's Ex. R-48 in Evidence, Plate #3. It clearly shows that the 12½% and 10% clause was used. Furthermore even if the clause is used there was no "loss" to Colliers proven as required under said 12½% and the 10% clause. See Exhibit EE page 79 hereof.

## VII

### **Allowance of Attorney's Fees and Travel Expense Not Proper Allowances**

It is submitted that if Appellant prevails in his arguments in Paragraphs I, II, III, IV, V, and VI of this brief Colliers will not be able to recover anything. To the contrary Appellant is entitled to recovery.

It is too elementary to submit authorities that one who hires attorneys and spends travel money for a futile purpose, an ill advised counter suit and an unfounded de-

fense of fraud cannot recover said expenses back. The amounts of \$25,000 for attorney's fees and \$11,011.99 for travel expenses, included in the Judgment below should be forthwith deducted.

### CONCLUSION

It is submitted that the trial court erred in finding and concluding that Appellant is not entitled to recover anything and awarding Colliers judgment in the sum of \$306,676.25 in that on the evidence and the law, judgment should have been in favor of Appellant in the sum of \$422,804.98 and the counterclaim of Colliers should have been dismissed.

Dated: \_\_\_\_\_, 1966.

Respectfully submitted,

KASHIWA AND KASHIWA

by SHIRO KASHIWA

*Attorneys for Appellant*

### CERTIFICATION OF CONFORMITY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KASHIWA & KASHIWA

By \_\_\_\_\_

SHIRO KASHIWA

*Attorney for Appellant*



## APPENDIX OF EXHIBITS

## PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
1	Agreement between Gates & Collier, 4/15/60		67
2	Agreement between Gates & Collier, 9/15/61		67
3	Assignment & Agreement P. F. Collier & Son Corp. & P. F. Collier Inc., 4/1/61		67
4	Agreement between P. F. Collier & Son Corp. & R. E. Gates & Son Co., 5/1/59 re: Solicitation of orders for various publications—Military		67, 239.
5	Agreement between P. F. Collier & Son Corp. & R. E. Gates & Son Co. re: Exclusive subscription selling rights for Collier's encycs.—Japan civilians		67, 239.
6	Changes affecting Tokyo 96B accts. receivable (Military)		67
7	Ltr., Crowell-Collier to R. E. Gates, 5/12/59		67
8	Power of Attorney—P. F. Collier Inc. to Ronald E. Gates, 3/14/61		67
9	Procedure for Opening Tokyo Branch, 4/1/60		67
25	P. F. Collier invoice, 6/20/60		101
14	Sight draft to P. F. Collier, \$500, 7/19/60		102
15	Sight draft to P. F. Collier, \$2,000 1/9/61		102
17	Copy ltr., Nork to Gates, 11/9/61		102
23	Invoice, Collier to Gates, 1/19/60		102

## PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
24	Invoice, Collier to Gates, 5/5/60		102
26	Invoice, Collier to Gates, 7/23/60		102
30	Ltr., Nork to Gates, 3/9/61		102
13	Computation (Collier Rights)		104
76	Invoice, Collier to Gates, 4/2/54		72
43	Import License, 3/5/62		154
53	Ltr., Ryan to Gates, 10/30/53		154
54	Ltr., International Expeditors to Gates, 3/1/60		154
37	Power of Attorney, Collier to Gates, 12/7/61		190
28	Ltr., Nork to Gates, 11/30/61		192
46	N. Z. & Australia Bank Power of Attor- ney, Collier to Gates & Nicolle, 1/4/62		192
11	List of drafts, Gates & Son to Collier & Son, 7/19/60 to 1/13/61		235
12	List of drafts, Gates to Collier, 1/9/61— 4/9/62		235
77	Map of Tokyo Hiratsuka Office Bldg.		268
75	Financial Analysis, U.S. Dollar figures, Orders Obtained by Gates under Con- tracts		300
78	Ltr., Collier to Gates, 11/10/60, & encls.		301
79	Ltr., Johnson to Gates, 8/24/60		301
80	Invoices, Collier to Gates, 5/1/59 and 3/11/60		301
81	Power of Attorney, Collier to Gates 8/8/61		301
82	Power of Attorney, Collier to Gates 3/14/61		301

## PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
83	Invoices, Collier (N.Y.) to Collier (Japan) 4/14/61, 11/8/61, 6/19/61 and 9/27/60		301
84	Ltr., Collier to Gates, 8/26/60		301
85	Ltr., Kelly to Gates, 8/23/60 & encl.		301
86	Sydney Branch, Commission Receipt, 4/4/62		301
87	Memo, Johnson to Kelly, 10/10/61		301
88	Ltr., American International Underwriters to Nork, 4/26/62		301
89	Minutes, Special Meeting Board of Directors of P. F. Collier, and Certification		301
90	Computation (Formerly Ex. FF)	355	
91	Computation (Formerly Ex. CC)—Details of Business Transacted ending 10/16/62	355	
92	Classification of Gates' & Collier's rights, Rev. 3/26/65	366	
94	Computation (Formerly Ex. EE)	406	
93	Commission Receipt, 12/21/61		427
95	Answers to Interrogatories 14, 18, 31, 32, 33 & 60 by Nork on 2/10/65	442	450
96	Computation sheet (marked Ex. Q)	450	
97	Computation sheet (marked Ex. P)	451	
98	Pamphlet "The Foreign Exchange and Foreign Trade Control Law (Japan), Law No. 288, Dec. 1, 1949"	459	460
99	The Commercial Code of Japan--1963	462	462
100	Civil Code of Japan	496	496

## PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
32	Copies of dollar draft purchased from First National City Bank of N.Y., Tokyo Branch		566
101	Affidavit of Tsuyoshi Saito (English Translation)	631	632
102	Page of signatures written by T. Saito	643	643
103	Certificate of Registration	687	690
104	Letter to Chief Customs Officer, Yokohama, 5/6/60	692	695
105	Letter from Nork to Gates, 7/11/60	779	
106	Communications from Collier file re: taxes	823	826
107	(Re-marked Defendant's R-1 at pp 860)—Summary prepared by A. Rabinowitz	829	
108	Computation of Commissions paid to Gates—(Plate 2)	895	945
109	P. F. Collier correspondence—8/15/61 & 9/5/61	914	917
118	Letter, Nork to Gates, 3/7/61	914	926
110	Letter, Nork to Gates, 9/21/61; memo from Nork to Kelly	914	917
111	Letter, Gates to Nork, 10/25/60	914	942
112	Letter, Nork to Kelly, 3/27/61	914	918
113	Letter, Nork to Gates re: Home Office loan, 4/26/61	914	954
114	Letter	914	
115	Letters, Nork to Kelly, between 2/21/61 and 7/25/61	914	922
116	Letter, Nork to Gates, 5/5/60 & encl.	914	927

## PLAINTIFF'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
117	Letters, Nork to Kelly, 2/21/61 and 6/12/61	914	922
119	Computation	937	
120	Computation—Actual Bad Debts Rates over 12-1/2% Base, 96B, 4/60—10/62	937	966
121	Computation of 12-1/2% & 10% Commission on 97B & 99B accounts	939	966
122	Letter, Marrack to Kashiwa, 12/16/65	968	
123	Contract form between P. F. Collier Inc. & purchaser of Collier's encyc.	975	982
124	Contract form between R. E. Gates & Son Co., Ltd., & purchaser of Collier's encyc.	976	
125	Contract between P. F. Collier Inc. & Antonio I. Uugaata, Guam, M.I.	976	
126	Letter, Nork to Kelly, 6/15/60	983	984
127	Letter	983	
128	Legal Notice	992	

## DEFENDANT'S EXHIBITS:

No.	Description	Trans. pages	
		For Ident.	In Evidence
N-12	Letter from Kelly to Gates, 12/15/60		216
N-31	Employer's Statement to Hanover Insurance Co., 4/12/60		200
N-32	Letter from Gates to Collier 6/5/61	419	465



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		For Ident.	In Evidence
G-21	Collier's Encyclopedia Contract 97B-51196, 12/2/61		1100
G-23	Collier's Encyclopedia Contract 97B-51322, 1/8/62		1100
G-24	Collier's Encyclopedia Contract 97B-51389, 1/20/62		1100
G-25	Collier's Encyclopedia Contract 97B-51391, 1/25/62		1100
G-26	Collier's Encyclopedia Contract 97B-51429, 2/1/62		1100
G-35	Letter from Boe to Gates, 12/14/61, & Letter, Boe to Gates, 3/14/62	1113	1115
G-21-A	Collier's Encyclopedia Contract 97B-51195, 12/4/61, etc.		1147
G-36	Memo from Kashiwa to Robert- son, Castle & Anthony, 8/20/65	1149	1149
G-37	Printed P. F. Collier Inc. letter with blank forms attached	1170	1180
G-13	Application of Gates to Mary- land Casualty Co. for bond, 1/20/54		1191
G-39	Graph, P. F. Collier, Inc., Sales 1960-1965, Tokyo Branch	1209	
B-23	List of Auditing and legal ex- penses of Collier re: Gates	1256	
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A	Court Order of Judge Tooru Iwano (Japan Court)		182
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Details of Business Transactions Ending - Oct. 16, 1962					
Title	I. Civilian	J. Schools	Military	Australia	Total
Code	97 B	99 B	96 B	98-B	"
Sets Received	2,313	186	1,480	1,623	5,602
Sales Price	269.50	239.50	199.50-699.00	312.50-416.25	199.50 - 699
Gross Sales	623,353.50	44,547.00	491,973.18	650,389.12	1,810,262.50
Service Charge	46,260.00	3,720.00	21,413.68	65,810.21	137,203.99
Net Sales	577,093.50	40,827.00	470,558.50	584,578.91	1,673,057.91
Sales Discount	26,664.00	362.34	1,667.68	-0-	28,694.02
Direct Collections	584,262.92	17,704.46	343,544.65	447,566.90	1,403,078.93
Direct Balance	12,426.58	26,480.20	148,428.53	202,822.22	390,157.53
Permitted	← 213,532.67 →		343,544.65	447,566.90	1,004,644.12
36% Comm.	-0-	-0-	-0-	210,448.41	210,448.41
34% "	196,211.79	13,881.18	159,989.89	-0-	370,082.86
7% "	40,396.55	2,858.82	32,939.10	40,920.52	117,114.99
12.5% "	77,919.19	-0-	61,496.65	81,298.64	220,714.58
10% "	-0-	4,454.70	-0-	-0-	4,454.70
1% "	5,770.93	408.27	4,705.59	6,503.89	17,388.69
5% "	28,854.68	2,041.35	23,527.93	29,228.95	83,652.91
Total Comm	349,153.14	23,644.32	282,659.16	368,400.41	1,023,857.03
Comm. Rec'd	238,670.27	13,881.18	129,210.48	16,700.58	(398,434.51)
Comm. Due	110,482.87	9,763.14	153,448.68	351,699.83	625,394.52



## EXHIBIT DD

Ex. D.D.

CLASSIFICATION OF RIGHTSGates Rights

Gross Sales Amount		\$1,810,262.80
Net Sales Amount		1,673,057.91
Commissions: 36%	\$210,448.41	
34%	370,082.86	
7%	117,114.99	
12.5%	220,714.48	
10%	4,454.70	
1%	17,388.68	
5%	83,652.91	\$1,023,857.03
Money Received		<u>398,462.51</u>
Gates Rights		\$ 625,394.52
Account Balance-Gates Collecting		<u>38,906.78</u>
		\$ 586,487.74
Discounts Given		<u>28,694.02</u>
Gates		<u>\$ 557,793.72</u>

Collier Rights

Gross Sales	\$1,810,262.80
Gates Total Rights	<u>1,023,857.03</u>
Total Rights	<u>\$ 786,405.77</u>





**EXHIBIT EE**

Ex. E.E.

CLARIFICATION

Collections	\$1,403,078.93
Collecting	38,906.78
Collecting	351,250.75
Not Allowed	<u>17,026.34</u>
	\$1,810,262.80
Given to Collier	\$1,004,644.22
Given by Gates from Collections	<u>398,434.71</u>
	\$1,403,078.93

SUMMARY

Given to Collier	\$1,004,644.22
Collier Rights	<u>786,405.77</u>
	\$ 218,258.45
Not Collected to 12/5/65	<u>122,613.52</u>
(ip. tr. 892)	
Collier holding over its own rts.	\$ 340,871.97
Collecting (above)	\$ 351,250.75
Additional Collected	<u>122,613.52</u>
Collecting Revised to 12/5/65	\$ 228,637.23



IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

RONALD E. GATES,

*Appellant,*

*v.*

P. F. COLLIER, INC.,

*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

---

**BRIEF FOR APPELLEE**

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CADWALADER, WICKERSHAM & TAFT,  
One Wall Street,  
New York, N. Y. 10005,

ROBERTSON, CASTLE & ANTHONY,  
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Honolulu, Hawaii 96801,  
*Attorneys for Appellee.*

FILED

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M. B. LUCK, CLERK

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IN THE  
**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

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No. 21308

---

RONALD E. GATES,

*Appellant,*

v.

P. F. COLLIER, INC.,

*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

---

**BRIEF FOR APPELLEE**

**Statement**

Plaintiff-appellant Ronald E. Gates appeals from judgment of the United States District Court for the District of Hawaii, Martin Pence, C.J. sitting without a jury. After ten days of trial, the Trial Court awarded defendant-appellee P. F. Collier, Inc. damages, special costs and interest in the amount of \$306,676.25 on its counterclaims for fraud, breach of fiduciary duty and breach of contract.

The Trial Court's Amended Decision in support of the judgment is reported at 256 F. Supp. 204.

## **Facts**

### **(1) The Basic Facts Are Uncontroverted**

Appellant's brief omits a statement of facts pertinent to his appeal. For this reason, appellee sets forth below a statement of facts proved at trial. These facts fully support the findings in the Trial Court's Amended Decision (Rec. 688-711).

### **(2) The Parties: Their Relationship 1954-1960**

In 1954, appellant Ronald E. Gates ("Gates"), President of R. E. Gates & Son Company, Ltd. ("Gates Company"), was engaged in selling books in Japan (Tr. 69, Rec. 688). Appellee's predecessor, P. F. Collier & Son, Inc. ("Collier"), a Delaware corporation engaged in selling sets of encyclopedias and other reference texts, was then expanding its overseas sales (Tr. 744). At that time, Gates Company entered into an oral agreement with Collier to purchase Collier encyclopedias and sell them at a price within its discretion for its own account (Tr. 251-252, 737).

This arrangement continued until 1959, when Collier entered into written agreements with Gates Company authorizing Gates Company to sell Collier publications on a commission basis to United States military personnel stationed in certain areas of the Far East (PX 4; Tr. 246, 738). At the same time the purchase and sale agreement on civilian transactions was put into writing (PX 5; Tr. 197, 228, 246, 737). By April 1960 Gates Company was indebted to Collier on book purchases for \$68,036.91 (Tr. 149, 291, 738). In spite of this indebtedness, Gates Company sought further credit from Collier (Tr. 739), but Collier refused (Tr. 288).



### **(3) The New Japan Branch Operation**

As an alternative, Collier proposed to set up its own branch operation in Tokyo with Gates as Branch Manager and with accounts receivable to be accounts receivable of Collier rather than of Gates Company (PX 9; Tr. 195, 196, 201, 227, 278). Gates agreed to this proposal and Collier registered its Japan branch as a branch of a foreign corporation doing business in Japan (Tr. 12, 347). Collier paid the requisite Japanese taxes for the taxable periods beginning April 26, 1960 (Tr. 824). Gates was listed as the "registered representative" of Collier in Japan (Tr. 139).

### **(4) The Contract and The Procedure**

On April 15, 1960 Collier entered into a written agreement with Gates *individually*, wherein Gates personally undertook to account to Collier for books received from Collier and money collected and due from customers (PX 1; Tr. 197-198, 364, 780, 986, 1000-1001).

After the reorganization of P. F. Collier & Son in 1961, the contract with Gates was assigned to P. F. Collier, Inc., the successor corporation (PX 3). On September 15, 1961 P. F. Collier, Inc. (also referred to herein as "Collier") and Gates entered into a new contract substantially identical to the April 15, 1960 contract (PX 1, PX 2). These contracts were negotiated and drafted in New York (Tr. 9-10). Collier executed the contracts in New York; Gates executed them in Tokyo (Tr. 9-10).

While the April 15, 1960 contract was in preparation, a document was drawn entitled "Procedure for Opening Tokyo Branch Japan" ("Procedure") (PX 9). The Procedure set forth rules governing the operation of this branch as well as the compensation to be paid Gates as

Collier's Japan Branch Manager (PX 9). Gates participated in the development of the Procedure and understood its provisions (Tr. 1009).

#### **(5) Gates' Contractual Responsibilities**

The April 15, 1960 contract specified the responsibilities Gates undertook to perform (PX 1). Gates was to act as Far Eastern Sales Supervisor of Collier's Japan branch with headquarters in Tokyo (Tr. 201, 202). He was restricted in the geographic area in which he might sell Collier publications (Tr. 132). He was required to forward all orders to Collier's New York office within ten days after receipt (Tr. 203-204, 209); Collier in New York could accept or reject any order (Tr. 82). He was required to deposit all collections in Collier's account at First National City Bank of New York in Tokyo ("FNCB Tokyo") (Tr. 80, 143, 206, 801, 1013). He had no discretion to withhold Collier money (Tr. 800-801). He was not permitted to use the name of Collier in any printed or written material without Collier's approval (Tr. 211-212). He was not permitted to assign the agreement without Collier's consent (Tr. 207). And, further, he was obligated to account for expenditures made on behalf of Collier (Tr. 1014).

#### **(6) Gates' Specific Obligations**

Pursuant to the Procedure (PX 9), Gates was required: (1) to send to Collier each month a list of checks drawn and their amounts (Tr. 212); (2) to send to Collier each month a statement reconciling Collier's bank statements at FNCB Tokyo (Tr. 213); (3) to allow an independent audit of the Japan branch at least once every six months (during the first year of the Japan branch operation an audit was to be made every three months) (Tr. 214);

(4) to follow a price schedule established by Collier (PX 9); and (5) to remit to Collier in New York on a daily, weekly and monthly basis, completed Collier forms detailing the books sold, collections made, collections remitted, commissions received, stock on hand and other relevant information to inform Collier in New York as to the exact status of the business of its Japan branch (Tr. 142, 210-211, 741, 1010, 1042, 1061, 1083, 1085).

As of the new contract date, April 15, 1960, Gates' business correspondence was transmitted on Collier's letterhead; previously he used the letterhead of Gates Company (Tr. 202). Further, as of this date, for the first time, Gates' responsibilities included the collection of money due and owing to Collier and the handling of stock merchandise belonging to Collier (Tr. 199). For that reason, Collier then obtained a \$50,000 fidelity bond on Gates as its employee (Tr. 198, 199, 1131).<sup>\*</sup> Similar bonds were issued in 1961 and 1962 (Tr. 215). In November 1961 Gates was appointed a Vice President of Collier (Tr. 202, 215, 322, 742, 1130).

The September 1961 contract added the Republic of the Philippines to Gates' territory and early in 1962 the parties orally agreed to add Australia (PX 2). On March 1, 1962, because of an increasingly bad collection record on sales to U. S. military personnel (Tr. 119), Collier and Gates signed an agreement transferring from Gates to Collier the collection responsibilities on such sales (PX 6).

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<sup>\*</sup> Not until after discovery of Gates' embezzlement and his dismissal by Collier in 1962 was Collier aware that appellant Gates had been convicted three times in American courts for obtaining property under false pretenses (Tr. 1185, 1189-1190).

**(7) Accounting Breakdown of Sales Under the 1960 and 1961 Contracts**

For accounting purposes, Collier sales transactions in the Far East were as follows (Tr. 122):

- (a) 96B—sales to U. S. military personnel for U. S. dollars;
- (b) 97B—sales to Japanese civilians in yen;
- (c) 98B—sales in Australia in Australian pounds; and
- (d) 99B—sales to Japanese schools in yen.

On sales to U. S. military personnel, Collier shipped the books directly from New York to the purchaser through the Army Post Office Service (Tr. 123-124). Payments for such purchases were made in U. S. dollars and forwarded directly to New York (Tr. 119). Books sold to Japanese civilians and schools were imported into Japan under import licenses issued to Collier by the Japanese Government (Tr. 15-16) and collections in yen were deposited in Collier's FNCB Tokyo account (Tr. 16). These yen were subsequently converted into U. S. dollars and transmitted to New York under the Japanese import licenses (Tr. 16).\*

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\* Collier's General Superintendent Simon J. Nork testified as follows regarding the reasons for the increase in the amount of foreign exchange requested under the import licenses after Collier and Gates entered into the 1960 and 1961 contracts (Tr. 108-109):

"Q. Now, with relation to this \$69.00 [the price at which Gates bought a set of encyclopedias from Collier before the 1960 and 1961 contracts] and the \$153.00 [the import license figure excluding collateral books], will you explain to us why there is that difference? A. We agreed upon this price in view of the fact that now we had to pay the cost of freight and insurance to get those books to Tokyo. Previously Gates paid those.

Now, when we sold the books outright to Gates, we didn't have to maintain a clerical staff. Now we have to maintain a clerical staff to keep records.

### (8) Gates' Fixed and Contingent Commissions

Pursuant to the contracts and the related Procedure (PX 1, PX 2, PX 9), Gates was to receive the following *fixed* and *contingent* commissions:

(a) a fixed "sales commission" of 34% (36% in Australia) of the net sales price (gross sales price less service charge) immediately upon the acceptance of the order by Collier regardless of the amount of down payment (Tr. 96, 113, 157-158, 174, 227, 325-326);

(b) a contingent "collection commission" of 7% of the net sales price on each individual order where 50% of the purchase price was paid by the customer within 15 months from the date the order was accepted by Collier (Tr. 17, 96, 98, 110, 227, 407);

(c) a 12.5% gross sales fund (10% on sales to Japanese schools after September 15, 1961), which, contingent upon the existing "loss ratio," could result in a commission to or a liability of Gates. Collier undertook to determine the amount to be characterized as a "loss" 30 months after the month the business was reported on 24-month contracts, and 15 months after the business was reported on 12-month contracts; this analysis was to be made

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Q. Clerical staff where? A. In New Hyde Park and in New York. And in addition to that, our editorial cost has gone up. So all this calculated into this \$153.

Q. This was all because of the cost to you, am I right?

A. This is the amount we agreed upon that it would cost us under this new arrangement in 1960." See also DX R-2—R-47.

The Trial Court found (Rec. 701):

"Nowhere did the plaintiff prove, or even attempt to prove, the actual cost or cost plus profit of any set of books landed and sold in Japan."

Furthermore, at trial plaintiff Gates never established the relevance of this cost figure.



on a month-by-month basis (Tr. 99, 110, 115, 379, 385, 399, 430, 435, 437, 466). For example, in November 1961 Collier would analyze all 12-month contract sales made during the month of July 1960, characterizing those not paid in full as "losses" and thus determining the "loss ratio" for the month of July 1960. If this amount of loss was lower than 12.5% of the gross sales for the month, Collier would pay Gates the difference as a bonus for securing good paying customers. On the other hand, if the amount of loss for the particular month exceeded 12.5%, Gates would owe the difference to Collier. Thus, Collier undertook either to absorb as a loss or to pay as a bonus 12.5% of all sales. During trial, Gates conceded that this was a proper method of analysis (Tr. 385). And see the Trial Court's findings (Tr. 379, 399, 466; Rec. 689-690):

(d) an incentive bonus sale commission of 1% of the net book sales if gross book sales by Gates during a 12-month period exceeded \$500,000, but were less than \$1,000,000, and a similar commission of 2% if gross sales exceeded \$1,000,000 (Tr. 99, 126); and

(e) by subsequent oral agreement, a 5% additional commission which Gates in his discretion could allow as a discount to a customer or retain for himself if the customer paid the full purchase price within 30 days (Tr. 114, 121, 227, 283, 409).

#### **(9) Gates' Fraudulent Scheme Began in April 1960**

Between April 1960 and April 26, 1962, Gates was Far Eastern or Asian Sales Supervisor of Collier and in this capacity collected certain money belonging to Collier on cash sales of Collier publications (Tr. 742-744, 798, 1173). 1,095 of these sales were actually cash sales for the entire purchase price, which Gates reported to Collier as installment sales to fictitious purchasers, concealing the true

nature of the sale (DX B-13—A, B, C). Gates remitted to Collier false down payments as if these sales had been installment sales, wrongfully pocketing the balance of the lump-sum purchase price which he had collected from the customer (DX B-13—A, B, C).

In order to maintain consistent reporting of the fraudulent sales, Gates held a conference with his staff on his return from New York in April 1960 and ordered certain false ledgers to be prepared and maintained (PX 101, DX B-13—A, B, C; Tr. 554, 597, 598, 604, 605, 627, 690, 696, 812, 1002, 1167). These false ledgers were kept partly in English and partly in Japanese (Tr. 1038). Collier never knew of these fake ledgers or the fraudulent reporting system until they were discovered by its officers on April 26, 1962 (205, 218, 744-745, 811).

#### **(10) Dummy Purchasers**

In continuance of his scheme and to conceal further the true nature of the transactions from Collier's auditors, Gates obtained through his staff the cooperation of various individuals in Japan whom he listed as purchasers on the fictitious installment contracts (PX 101; Tr. 603, 610, 612, 637). These dummy purchasers were instructed, upon receipt of a confirmation letter from Collier's auditors, to turn the letter over to Gates in order that it might be answered in harmony with the false information reported to Collier by Gates (PX 101; Tr. 618, 814).

#### **(11) Collier's Discovery of Gates' Fraudulent Scheme**

In the spring of 1962, Collier discovered that there was a steady increase in reported installment sales, combined with a decrease in cash purchases (Tr. 746, 747, 794). Collections from sales were falling off rapidly (Tr. 746, 747, 794). Collier also noticed that payments

from Japanese civilians were being reported in blocks, with the same purchasers "paying" on the same day of each month—an unusual occurrence (Tr. 763-764).

At a conference at Collier's New York office in April 1962, Norman E. Bennett, then Senior Vice President of Collier (now President), was designated to go to Tokyo to find out what was wrong at Collier's Japan branch (Tr. 747).

On Tuesday evening, April 24, 1962, Gates met Bennett at the Tokyo Airport (Tr. 541, 748). Enroute to the hotel, Gates told Bennett of his desire to cooperate in the investigation of the Japan branch (Tr. 748). He advised Bennett that he had discovered something wrong, was inquiring into the situation and would have the results of his inquiry the following morning (Tr. 543, 748).

The next morning Gates telephoned Bennett, saying he would need more time to complete his investigation (Tr. 543, 748). He asked postponement of their meeting until the following day (Tr. 541, 748, 1164).

On Thursday morning, April 26, 1962, Bennett went to Gates' office accompanied by Robert B. Van Arsdale, Resident Partner of Deloitte, Plendor, Haskins & Sells, Collier's auditors in Japan (Tr. 748-749, 810). Gates told them that he had discovered that his Japanese accountants had been keeping "secret ledgers", which he turned over to Bennett (Tr. 540, 557, 749, 750, 812). Gates explained that these ledgers recorded the legitimate cash purchases which were falsely reported to Collier as installment sales (Tr. 558, 812). Gates indicated that there might be a shortage (Tr. 558). Gates admitted to Bennett and Van Arsdale that such a scheme was completely wrong, and that neither Gates nor anyone working for him had a right to this money (Tr. 755, 815). Gates said he wished

to cooperate in every way in accounting for the money withheld from Collier (Tr. 559).

### **(12) Gates' Admission of Fraud**

On Friday, April 27, 1962, Bennett and Van Arsdale returned to Gates' office (Tr. 813). Gates asked to see Bennett alone, but Bennett refused (Tr. 752, 814). Bennett and Van Arsdale then entered Gates' private office (Tr. 752). Gates said that the day before he had withheld certain information from them, that he had himself created and maintained the secret ledger system, and that he was responsible for the money wrongfully retained (Tr. 563, 753, 770, 814, 999, 1027, 1077). Bennett asked Gates why he had done this (Tr. 755). Gates replied that the system enabled him to obtain money he needed for the Japan branch operation (Tr. 755). Gates again admitted this was wrong (Tr. 755, 779, 815). Gates added that he had created the secret ledger system in order to repay Collier the \$68,036.91 debt owed by his company (Tr. 755). He stated that he was personally responsible for repaying to Collier the money withheld (Tr. 755, 815, 1160). He requested permission to inform the fidelity bond company of his defalcation (Tr. 756, 815, 1165).

### **(13) Gates' Turnabout of His Confession**

On Saturday, April 28, 1962, Bennett and Van Arsdale returned to Gates' office (Tr. 757). Gates repeated his desire to repay Collier (Tr. 756, 757). On Tuesday, May 1, 1962, Bennett went to Gates' office to examine Collier records to determine the amounts due Collier (Tr. 758). Gates entered the office and told Bennett that he had been checking his records and had concluded that he had done nothing wrong, and that any further communications with him must be made through his lawyer (Tr. 566-567, 758).

Although Bennett had the "secret ledgers" at his hotel, Gates prevented Bennett from removing from Gates' office the remaining records of the Japan branch operation (Tr. 548, 549, 554, 561, 568, 759, 835, 836).

**(14) Collier Discharged Gates and Terminated Their Relationship**

The Board of Directors of Collier had met on April 26, 1962 and voted to discharge Gates (DX B-16; Tr. 759). On May 2, Bennett handed Gates a letter (DX B-17) confirming Gates' discharge from Collier and termination of his contract (Tr. 21, 759-760, 1315). Gates took the letter and gave it to his attorney (Tr. 760). A copy of the letter was also sent to Gates by registered mail (Tr. 760). As Bennett testified, Gates was discharged by Collier for all purposes (Tr. 166, 172, 762). Bennett then struck Gates from the rolls as Collier's registered representative in Japan on May 9, 1962 (DX B-19; Tr. 761).

**(15) Gates' False Statements After His Discharge**

Following discovery of the fraud, Gates sought to obfuscate his discharge and the open account between himself and Collier by seeking on a manifestly false affidavit an *ex parte* order from a Tokyo court precluding Bennett and S. J. Nork (Collier's General Superintendent) from acting as Collier agents in Japan (Ct. Ex. A, DX G-1, G-34-A; Tr. 181, 804, 1015-1037). At the same time, Gates pretended that he still represented Collier in Japan, and sold books and collected cash on account for his own use (Tr. 947).



**(16) Gates Owes Collier \$169,013 Under the 1960 and 1961 Contracts**

The excess amount collected under Gates' scheme was not deposited in Collier's bank account as required by the contracts (Tr. 818). As the purported installments became due, Gates would pay these amounts to Collier, but when Collier discovered Gates' scheme and terminated his contract and employment, \$169,013 of Collier money was still unreported and unremitted by Gates (DX R-48).

All the Collier business records utilized in calculating this amount were introduced into evidence (DX R-2 through R-47) as were accounting summaries reflecting these records (DX R-1, R 48 and PX 108). This information was prepared by Allan Rabinowitz, Manager of the Accounting Controls Department of Crowell Collier & Macmillan, Inc. (Tr. 849), a C.P.A. (Tr. 850) and a Professor of Accounting at Pace College (Tr. 851).

**(17) Gates Owes Collier \$38,403 for 251 Sets of Encyclopedias Unaccounted For**

During the term of the contract, 2,500 sets of Collier's Encyclopedia were shipped to Gates in Japan under the import licenses (Tr. 991, 1134, 1137). One hundred of these sets arrived in Japan after Gates' contract had been terminated; nevertheless Gates took possession of these 100 sets (Tr. 946). Gates has failed to account for 251 of the 2,500 sets (DX B-17; Tr. 946, 950; Rec. 705). The wholesale value of this merchandise in Japan on the date of conversion was \$38,403 (Tr. 1344; Rec. 705).

**(18) Gates Owes Collier \$9,000 on Unpaid Loans**

On December 14, 1961 and March 14, 1962 Collier made Home Office Loans to Gates personally at his request, each

in the amount of \$5,000 (DX G-35; Tr. 1110, 1114). To date Gates has paid only \$1,000 on these loans totalling \$10,000, thus leaving an outstanding balance of \$9,000, which amount became payable on the termination of Gates' contract (DX G-31; Tr. 1118).

**(19) Collier Incurred Reasonable and Necessary Expenses of \$11,011.99 As a Direct and Proximate Result of Gates' Wrongdoing**

Immediately after the defalcation of Gates was discovered, Collier incurred travel and related expenses in its effort to settle and clarify Gates' status prior to Collier's attempt to reestablish a new sales organization (Tr. 1206-1208, 1249-1252, 1268, 1271). These expenses, which totalled \$11,011.99, are limited only to the expenditures made by Bennett and Nork in trips to Japan and Australia immediately after the termination of Gates' contract, and do not include other expenditures incurred by Collier on account of Gates' defalcation (Rec. 709).

**(20) Gates' Misconduct Caused Collier to Incur Reasonable Attorneys' Fees of \$25,000**

In addition, Collier has incurred legal and audit expenses of \$78,000 (DX B-23), which includes payments to Collier's auditors and attorneys in New York, Hawaii, Japan and Australia (Tr. 1252-1254). The Trial Court found that \$25,000 of these expenses were directly related to the legal proceedings in Hawaii and Japan, including: an action by Collier to attach Gates' property in Tokyo; an action by Collier against Gates for damages arising out of Gates' defalcation; defense of Gates' action against Collier officers Bennett and Nork; and certain pre-trial expenses of the instant case (Rec. 706-709). The Trial

Court found that these expenses were incurred as a result of Gates' fraud and the institution by Gates of vexatious litigation, and that the figure of \$25,000 was a figure which Collier could not reasonably recover in any other litigation now pending (Rec. 707-708).

**(21) Judgment For Collier on Its Counterclaims  
Against Gates—\$306,676.25**

In 1963, Gates fled Japan and entered Hawaii (Rec. 696). He initiated this suit on July 9, 1964, demanding \$367,183 as purported commissions (Rec. 1-5). On July 30, 1964, Collier's counterclaims for \$833,290 were filed (Rec. 27-33). On April 18, 19, 20, 21, 22, 25 and 26, and June 1, 2 and 3, 1966, the case was tried before Judge Pence without a jury. By an Amended Decision dated July 8, 1966, Judge Pence found in favor of Collier on the counterclaims in the amounts of \$169,013 (unaccounted for under the contracts), \$38,403 (Collier's Encyclopedias unaccounted for) and \$9,000 (debt), all with 6% interest from May 2, 1962 through July 6, 1966, together with \$11,011.99 (necessary Collier expenses caused by Gates' conduct) and \$25,000 (reasonable attorneys' fees), a total judgment of \$306,676.25 (Rec. 686-711).

Gates filed a notice of appeal on July 13, 1966 (Rec. 713-714). The grounds for this appeal were exhaustively litigated by Gates at trial.

## ARGUMENT

### POINT I

**The Trial Court was correct in holding the 1960 and 1961 contracts between Gates and Collier enforceable and not proved to be in violation of the Japanese Foreign Exchange Law.**

Up to April 15, 1960 Gates Company bought encyclopedias from Collier for \$69 a set and resold them in Japan for its own account. Thereafter, pursuant to the 1960 and 1961 contracts (PX 1, PX 2), Gates sold these encyclopedias for Collier's account through Collier's Tokyo branch. With this change, Collier duly applied for and received from the Japanese government an import license as required by the Japanese Foreign Exchange and Foreign Control Law, permitting Collier to convert from Japanese yen into American dollars and to send out of Japan to Collier's New York office \$172.50 of the gross sale price (\$269.50) of every set of encyclopedias sold in Japan. The import license was granted for \$172.50 per set, allowing Collier to receive dollars in New York for books sent to Japan. (Rec. 690, 691, 700-702.)

Gates contends that his contracts with Collier (PX 1, PX 2) intentionally violated the Japanese Foreign Exchange Law (PX 98). Gates argues (App. Br. pp. 17-22) that the "cost" of the encyclopedias to Collier was not \$172.50 per set, that this figure was allegedly "padded" by Collier to evade Japanese Foreign Exchange Law restrictions on currency outflow from Japan and that he was entitled to a portion of every \$172.50 allowed out of Japan under the import licenses. Gates concludes that this

purported but unproved procedure and transfer of his funds from Japan to New York under contracts with Collier violated the Japanese Foreign Exchange Law and renders the contracts void. Gates then presses the notion that he, not Collier, should recover for his services to Collier (App. Br. pp. 15-22, 26-32).

The Trial Court rejected this contention on the ground that Gates did not prove the Japanese Foreign Exchange Law (Rec. 703-704, 705).\*

At trial, Gates introduced into evidence the bare statutory text of the Japanese Foreign Exchange Law (PX 98). He did not introduce any testimony by a member of the Japanese bar as to the meaning of the statute or its application or effect in the circumstances of this case. He did not introduce any judicial decisions or administrative opinions or regulations interpreting or implementing the Japanese Foreign Exchange Law. Nevertheless, Gates (Br. pp. 15-26) urges this Court to reverse the Trial Court's judgment because of his empty claim that the record shows that the 1960 and 1961 contracts violated the Japanese Foreign Exchange Law and are accordingly void.

The Trial Court properly rejected this contention, judicially noticing that

“\* \* \* there must be Japanese cases or administrative opinions which set out and construe the definitions, restrictions and prohibitions [in the Japanese Foreign Exchange Law] referred to [by

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\* The Trial Court also ruled that Gates did not sustain his burden of proving (1) what the actual “cost” to Collier of a set of encyclopedias was under the contracts; (2) that any of the \$172.50 per set allowed out of Japan under the import licenses was unconditionally due and owing to Gates when it left Japan; or (3) that the Japanese government had ever taken any action against Collier for violation of the Japanese Foreign Exchange Law (Rec. 700-705).



Gates]. \* \* \* It is impossible for this court to determine the legal application of the broad words of that law to the particular facts of this case, in the absence of proof by Japan case law or administrative opinion. \* \* \* [P]laintiff has not proved the judicial interpretation and legal effect of the Japanese law to the particular facts of this case and this court cannot find that the contract was illegal and void." (Rec. 703-704, 705)

In *Dulles v. Katamoto*, 256 F. 2d 545, 547 (9th Cir. 1958), this Court said:

"We judicially recognize that Japan is a civilized state having a constitution, a legislative body, with its statutes, courts administering laws with lawyers and judicial decisions \* \* \*."

The party seeking to prove Japanese law has a "heavy burden of proof". *Id.* at 548. The "usual method of proof of a foreign law [is] by the testimony of an experienced Japanese practitioner." *Id.* at 547. Indeed, a party's failure to sustain its heavy burden of proof of Japanese law "makes its contention open to the inference" that the Japanese law, if properly proved, would sustain the position of the *opposing* party. *Ibid.*

Gates could not sustain his burden of proof by mere introduction of the broad and ambiguous Japanese Foreign Exchange Law text:

"The party relying on foreign law has the burden of proof. It must establish precisely what that law is and how it is interpreted. \* \* \* A mere translation of a foreign statute without more, without the background, without the context or the area of internal application is insufficient. *Usatorre v. The Victoria*, 2 Cir., 1949, 172 F. 2d 434. In particular the specific portion of potential appli-

ability contains ambiguities which a United States Court is not competent to resolve." *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), *on rehearing* 192 F. Supp. 817 (S.D.N.Y. 1961), *aff'd* 297 F. 2d 611 (2d Cir. 1962).

The Trial Court's findings have ample support in the record and, we submit, should not be disturbed by this Court. Rule 52(a), F.R.Civ.P.; 5 MOORE, FEDERAL PRACTICE, ¶52.03 [1], p. 2616 (1964). Gates did not carry, as he must, his burden of proof of the Japanese Foreign Exchange Law. Accordingly his arguments for reversal based on that foreign statute must fail.

## POINT II

**The Trial Court should be affirmed in its finding that Gates committed fraud and breached his 1960 and 1961 contracts, since New York, not Japanese, law governed questions of fraud and breach of contract.**

Collier's defenses and first two counterclaims sound in tort (fraud and breach of fiduciary duty) and contract (Rec. 28-32). The Trial Court found that Gates defrauded Collier and breached his contractual as well as his fiduciary duty toward Collier (Rec. 696-697, 698). Gates contends reversible error on the ground that such issues are governed by Japanese law, unproved at trial by Collier (App. Br. pp. 33-39).

But the law of New York properly applies to the issues of Gates' fraud and breach of contract. Accordingly, there was no necessity for Collier to prove the law of Japan to establish its defenses and counterclaims.

The Trial Court found these facts (Rec. 688-694, 696):

“Defendant Collier [is] a Delaware corporation with its principal office in New York \* \* \*. \* \* \* Gates came to New York in March of 1960 and entered into a personal contract with Collier, dated April 15, 1960 \* \* \*. Orders obtained by Gates and his sales personnel were to be forwarded to Collier in New York for acceptance by Collier, there. \* \* \* Collier was to ship, at its own expense, such books as were required for sales in Japan, to Gates’ warehouse in Tokyo. \* \* \* All military orders were to be shipped by Collier’s New York office to the purchasers. \* \* \* All accounts sold by Gates in Japan were to be the accounts receivable of Collier. \* \* \* Dollars collected in Tokyo were to be remitted directly to New York. The amount remitted to Collier in New York on yen collected was to be the amount as limited by Collier’s Import License. \* \* \* So that Gates could be paid immediately the commission on the dollar accounts, Collier established an “Imprest Fund” with the Long Island Trust Company in New York, on which Gates had the power of attorney and from which he could draw to pay his sales commission. \* \* \* Collier paid all legal, tax and other expenses for setting up the Tokyo branch of its corporation, and applied for and received a Japanese Import License so that Collier in New York could be paid for all of the books sent to the Japan office. \* \* \* The contract was agreed upon in New York while Gates was there. Collier signed it in New York and Gates signed it in Tokyo. Both parties operated under the above contract until September 15, 1961, when a new agreement was entered into whereby Gates became ‘Supervisor of the Asiatic Division of Collier’ with the same obligations, duties, etc. \* \* \*.

\* \* \* \* \*

"On [April 26, 1962] \* \* \* Gates \* \* \* exhibited [to Bennett and Van Arsdale] three ledgers (Exs. B13—A, B and C) representing that his Japanese bookkeepers had contrived a system of reporting to New York only selectively the money collected \* \* \*. The ledgers show that immediately after the April 1960 contract had gone into effect, i.e., beginning May 4, 1960, Gates set up a scheme of embezzlement whereby he falsely and fraudulently reported to Collier the COD and cash sales to Japanese civilians as having been term sales, thus taking for himself not only the full amount of commissions to which he might be entitled but also all of that portion of the sale which became immediately due to Collier. \* \* \* [T]he ledger indicated that the names and addresses of the purported purchasers on term sales orders, as sent into Collier in New York, were not the true purchasers, but were relatives and friends of Gates and his staff who were given instructions to send any auditors' letters back to Gates Co. for answering.

"In 1963, Gates moved \* \* \* to Hawaii, and in July 1964 filed this diversity action for \* \* \* \$367,000 \* \* \*."

The Trial Court, in a diversity case, was obligated to apply Hawaiian conflict of laws rules to determine whether New York or Japanese law governed the choice of law applicable to Gates' fraud and breach of contract. *Eric R.R. Co. v. Tompkins*, 304 U. S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Sampson v. Channell*, 110 F. 2d 754 (1st Cir. 1940), *cert. denied* 310 U. S. 650 (1940). But there are no Hawaiian cases defining rules pertinent to these issues (Tr. 484; Rec. 486). Hence, the Trial Court looked to general conflict of laws principles enunciated by courts in sister states to determine what rule the Supreme Court of Hawaii, the forum

state, would apply if this case were before it. *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F. 2d 317, 319 (5th Cir. 1959), *cert. denied* 361 U. S. 885 (1959), *rehearing denied* 361 U. S. 926 (1959).

At the trial, the Court indicated that it would look to the "center of gravity" or "grouping of significant contacts" rule to determine whether the law of New York or that of Japan applied to this case (Tr. 484-489). That the Trial Court concluded New York law was applicable appears from the fact that the Court made its findings of fraud and breach of contract without requiring any proof of Japanese law (Rec. 696-697, 698) and specifically applied New York law to damage aspects of the case (Rec. 710 and fn. 16). We submit that the Trial Court was correct in applying New York law to the issues of Gates' fraud and breach of contract.

**The Rule in Tort Cases.** In *Kemart Corp. v. Printing Arts Research Lab., Inc.*, 269 F. 2d 375 (9th Cir. 1959), *cert. denied* 361 U. S. 893 (1959), this Court considered a similar situation—absence of an applicable state conflict of laws rule indicating which jurisdiction's substantive law should govern a tort case. 269 F. 2d at 392. This Court held that the substantive law of the state with the closest relationship to the parties involved in the litigation and the strongest contacts with the subject matter of the litigation should govern. *Id.* at 392-393, and see fn. 12. This Court cited *Lauritzen v. Larsen*, 345 U. S. 571, 582 (1953), a tort case in which the United States Supreme Court noted that

"\* \* \* our municipal law has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved."



See also 345 U. S. pp. 583-593.

Factors considered by this Court in applying the rule in *Kemart* were: (1) principal place of business of the parties; (2) the state where the publications complained of (this was a defamation action) were received and read, as opposed to their place of origin; (3) the state where the damage or injury was suffered. *Id.* at 392.

**The Rule in Contract Cases.** Strong authority exists for application of the "center of gravity" or "grouping of contacts" rule to determine which jurisdiction's substantive law governs a contract and questions of its breach. *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P. 2d 543, 545-546 (majority), 552-553 (dissent) (1964); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N. J. 475, 170 A. 2d 22, 32 (1961); *Boston Law Book Co. v. Hathorn*, 119 Vt. 416, 127 A. 2d 120, 125 (1956); *Auten v. Auten*, 308 N. Y. 155, 124 N.E. 2d 99, 101-102 (1954); *Jansson v. Swedish American Line*, 185 F. 2d 212, 218-219 (1st Cir. 1950); *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E. 2d 417, 423 (1945). Under this rule, a court will apply to a contract the substantive law of the state which has the most significant contacts with the case and

"\* \* \* the greatest concern in defining and regulating the rights and duties existing under that agreement, and, specifically, in determining the circumstances that effect a termination or repudiation of the agreement." *Auten v. Auten, supra*, 124 N.E. 2d at 103.

Factors which the courts in the above cases have considered in applying this rule are: (1) citizenship of the parties; (2) place of negotiation, drafting and execution of the contract; (3) place where the party damaged by the breach would have received payment if the contract had been fully performed.

Here, the record and the Trial Court's findings of fact quoted above reveal that New York is the jurisdiction having the most significant contacts with this case and the most intimate concern with its outcome. Collier had its principal place of business in New York; Gates, while not a New York domiciliary, was a citizen of the United States and not of Japan; Gates and Collier negotiated the original contract in New York and both contracts were drafted in New York, in English, and executed by Collier in New York; Gates was to send all orders to Collier's New York office, for acceptance by Collier there, and was to send accurate reports and proper remittances of money collected to Collier's New York office; Gates sent the false and fraudulent orders and reports and the incorrect remittances to Collier's New York office, where Collier relied on them and was injured.

These facts and the applicable rules of law warrant the conclusion that New York law applies to the issues of Gates' fraud and breach of fiduciary duty and contract.\* The Trial Court's findings in this regard are also correct and should be affirmed.

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\* Since this was obviously not a criminal case, the Trial Court's use of the word "embezzlement" to characterize Gates' conduct is simply employment of the term in its generic sense to describe Gates' fraud and breach of his fiduciary duty to pay or account to Collier for money in Gates' possession but belonging to Collier. *Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co.*, 115 Ky. 863, 75 S.W. 197, 198 (1903).

### POINT III

**The Court below was correct in finding the Collier-Gates relationship terminated on May 2, 1962.**

The Trial Court found that *all* Collier-Gates contracts were terminated as of May 2, 1962 (Rec. 697). Gates urges, however, that the contractual arrangement between the parties should be viewed by this Court as four divisible or separable contracts and that the termination notice given by Collier on May 2, 1962 served to terminate only the Japanese civilian (97B) and Japanese school (99B) aspects of the agreement. Under New York law, the question of divisibility of contracts is a question of the intent of the parties to be determined by the trier of facts. *Clark v. West*, 137 App. Div. 23, 122 N. Y. Supp. 380 (2d Dep't 1910), *aff'd* 201 N. Y. 569, 95 N.E. 1125 (1911); *Ming v. Corbin*, 142 N. Y. 334, 37 N.E. 105 (1894). In its Amended Decision, the trier of facts found:

“This court has already indicated orally from the bench and now states again that the three ledgers (Exs. B13-A, B and C) on their face show that as of May 13, 1960, Gates began embezzling monies due Collier under the first contract and continued such embezzlements until Bennett discharged him as Collier's representative in Japan and took over the business on May 2, 1962. The two weeks' notice provided by the contract was obviously intended to apply to a voluntary termination of the contract—without involving any such gross and criminal breach thereof, as found here. By May 2, 1962, Bennett had before him clear and positive proof of Gates' fraud. Bennett's letter of discharge on May 2 and his acts immediately thereafter constituted ample notice to Gates that the contracts

were forthwith terminated, and for what reason. Nork's actions in Australia, likewise gave the same notice. Under the factual circumstances, the two weeks' notice referred to in the contract had no application. The breach by Gates was so substantial and fundamental as to completely destroy the personalized foundation of the contracts and negated any possibility of Gates being permitted to continue to run Collier's Japan and Australian operations. Failure to terminate promptly after discovery of Gates' fraud would have waived the breach. All Collier-Gates contracts were terminated as of May 2, 1962." (Rec. 696-697).

Thus, in accord with Collier's contention that the different *aspects* of the contract were separated for accounting purposes, the Trial Court determined that Gates' breach was a breach of the entire indivisible contract.

Moreover, Gates misconstrues why the Trial Court found that Gates owes Collier \$169,013. Collier's Exhibit R-48, the summary of the account between the parties, was based on an assumption of *no fraud* by Gates. This amount would have been due from Gates to Collier had the contract been terminated on May 2, 1962 without proof of fraud on Gates' part. As the Trial Court held:

"\* \* \* defendant had an exhaustive study of all of the Gates' Japan and Australian accounts made by Rabinowitz. In his calculations, Rabinowitz gave Gates full credit for all sales up to and including May 2, *as if Gates had not committed fraud and embezzlement*. His calculations, *made on a basis most favorable to Gates*, showed that out of gross sales of over \$1,069,549, Gates' liability under the 12.5% clause for the 96B-Military and 97B-Japan civilian accounts, as well as the 10% liability clause on 99B-Japan schools accounts was

\$185,822. Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier \$169,013 under the contracts." (Rec. 699-700) (emphasis added).

Collier's extensive proof of Gates' fraud warranted the finding of the Trial Court that all Gates' contracts with Collier were justifiably terminated on May 2, 1962 without the need for two weeks' notice.

#### POINT IV

**Since the attorneys' fees and travel expenses were the proximate result of Gates' fraud, the Trial Court properly exercised its discretion in awarding those fees and expenses to Collier.**

Federal courts, hearing cases based on diversity jurisdiction, may award counsel fees. *Universal Oil Co. v. Root Rfg. Co.*, 328 U. S. 575 (1946); *Sprague v. Ticonic Bank*, 307 U. S. 161 (1939); *Dodge v. Tulleys*, 144 U. S. 451 (1892).

This Court has followed this equitable policy, allowing attorneys' fees in its discretion. In *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952), *aff'd* 209 F. 2d 467 (9th Cir. 1953), the Court stated that it was

"\* \* \* not unmindful that since *Erie R. Co. v. Tompkins*, \* \* \* a number of federal courts have indicated that in a diversity case a federal court should follow the state practice in respect to the allowance of attorney's fees. \* \* \* Concededly under California law, attorney's fees are not allowable in actions in the nature of interpleader. \* \* \* But, the



Court adheres to the view which it expressed in *Kellems v. California CIO Council*, D.C. 1946, 6 F.R.D. 358, 361, that Rule 54(d) of the Federal Rules of Civil Procedure vests a discretionary power in the court with respect to the allowance of costs, including the attorney's fees, the exercise of which cannot be curtailed by state legislation." 104 F. Supp. at 67-68.

The Ninth Circuit affirmed and stated that:

"The allowance of costs, including attorney's fees, is a matter within the discretion of the trial court and will not be disturbed unless an abuse of that discretion is clearly shown." 209 F. 2d at 476.

## CONCLUSION

**The judgment of the Trial Court should be affirmed.**

Dated: November 21, 1966.

Respectfully submitted,

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**Certificate**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER M. BROWN

.....  
Peter M. Brown,

*Attorney.*



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**No. 21308**

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**IN THE**  
**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

**RONALD E. GATES,**  
*Appellant,*

vs.

**P. F. COLLIER, INC.,** a Delaware Corporation,  
*Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII.**

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**APPELLANT'S REPLY BRIEF**

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**FILED**

**DEC 9 1966**

**Wm B. LUCK, CLERK**

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**FEB 15 1967**





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**No. 21308**

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**VS.**

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*Appellee.*

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF HAWAII.**

---

**APPELLANT'S REPLY BRIEF**

---

**STATEMENT**

As Appellee Collier states "The Basic Facts Are Uncontroverted" (Ans. Br. 2) in this case.

Ex. CC (Op. Br. 75), Ex. DD (Op. Br. 77) and Ex. EE (Op. Br. 79) are based on basic figures supplied by Appellee Collier in response to written interrogatories. It is significant that these figures are not disputed.

Certain facts more minutely stated in the arguments of the Opening Brief are not disputed by Appellee. For example at the bottom of page 44 of said Opening Brief Nork's testimony that "No. 96 was entirely separate from the Japanese Civilian" is not disputed.

A further example is the non-proof of the Japanese embezzlement statute. (Op. Br. 49) The specific facts on pages 50, 51, 52, 53, 54 and 55 of Gates' Opening Brief are not disputed; these all show that there was really no fraud (even if New York law applies, without admitting) because of the reasons stated therein. The minute facts relating to causation of damages, pages 56 to 60 opening brief are also not disputed by Collier.

Appellee Collier attempted to state every alleged relevant fact in its "statement" of 15 pages. (Ans. Br. 1-15) Appellant Gates tried to state the facts in a summary form in nine pages (Op. Br. 5 to 14) but went into detailed facts in the argument. The detailed important facts stated in the argument portion of the Opening Brief remain unanswered. The only inference is that Gates' facts stated in detail in his argument cannot be denied.

## **REPLY ARGUMENT**

(See footnote 1)

### **I**

#### **Appellee Collier's Attempted Answer of Appellant Gates' Contention of Illegality of 1960 and 1961 Contracts under Japanese Foreign Exchange Law Unsatisfactory.**

Appellant in his Opening Brief divided his argument of illegality under the Japanese Foreign Exchange Law into parts A, B, C and D as follows:

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1. (Op. Br.       ) means Appellant's Opening Brief at blank page. (Ans. Br.   ) means Appellee's Answering Brief at blank page.

- A. "The Japanese Civilian (97B) portion of the contract was absolutely illegal under the Japanese Foreign Exchange Laws." (Op. Br. 17-22)
- B. "The U. S. Military 96B portion of the contract was illegal under the Japanese Foreign Exchange Laws." (Op. Br. 22-24)
- C. "The Contracts of April 1960 and September 1961 were service contracts which required prior approval." (Op. Br. 24-25)
- D. "Illegal to Send Book Orders from Tokyo to New York." (Op. Br. 25-26)

At the trial of the case the above arguments were made in the above order, separately. The trial court rendered its decision on points A and B separately for separate and different reasons. The trial court did not rule on points C and D. Appellee Colliers in its Answering Brief (Ans. Br. 17-18) confuses the question by attempting to lead this court to believe that the trial court consolidated points A and B together in rendering the decision. It was otherwise, A and B were dealt separately.

The trial court held on point A as quoted in foot note 2 below. The portion of the trial court's decision which

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2. "Plaintiff's alternate position is that even so, Gates is not liable to Collier because the contracts, excluding the Australian contract, are void inasmuch as they are in violation of the Foreign Exchange Control of the laws of Japan. The Civil and Commercial Codes of Japan and the Japanese Foreign Exchange and Foreign Trade Control Law were put into evidence. "When it opened its Japan branch, defendant applied for and secured an Import License from the Japanese government as provided by its law and shipped its encyclopedias and accompanying books to its Tokyo branch at a unit price of \$172.50 per set, representing for the purposes of the Japanese Import License that such was 'the full amount of invoice covering cost of books, payable in U. S. Dollars in twelve (12) equal monthly installments \* \* \*.' Payments were made to Collier out of the Tokyo bank account on this basis.



Appellee Colliers quotes on page 17 of Collier's Answering Brief deals exclusively with point B. The trial court made

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"Plaintiff presented three theories upon which he urged the court to find the contracts were void, in that the parties agreed to violate the Japanese Foreign Exchange & Foreign Trade Control Law (J.F.E.):

"1. Because the price charged Gates Co. by the defendant for similar books prior to the April 21, 1960, agreement was \$77.87 per set, FOB Ohio, that figure represented the actual cost (plus, of course, some profit) to the defendant for its books, and the difference between that figure and the \$172.50 could not possibly reflect the true cost of the shipping and additional charges resulting from Collier's shipping the books to itself in Japan under the new contract.

"2. The percentages of the gross retail sales price to which Gates could be entitled under the contract was 59.5%, leaving Collier's rights to but 40.5%. Thus, Collier's 'cost plus profit' was but \$118.31, leaving \$54.19 out of the \$172.50 to be deposited in dollars to Gates' account in New York (a transfer of funds not allowed under the law).

"3. Gates testified that the \$172.50 was deliberately fixed by agreement in order that he might be enabled to get the \$54.19 transferred out of Japan."

The above claims were denied by the defendant.

"The price charged Gates Co. prior to the April, 1960, contract has no probative effect in sustaining plaintiff's contention as to the cost of Collier's books shipped to Gates under the contracts. The relationship of the plaintiff and defendant at that time was strictly a buyer and seller relationship. All costs and risks of shipment, sales and collection were borne by Gates as the buyer. Even if the evidence had not shown that Collier's costs had increased about the time of the contracts, this court could not find from the evidence that the \$77.87 was in any manner relative to proof of Collier's costs per set under the contracts.

"Nowhere did the plaintiff prove, or even attempt to prove, the actual cost or cost plus profit of any set of books landed and sold in Japan. As stated heretofore, the percentage claimed by plaintiff to represent the respective shares of Gates and Collier in the gross sale price cannot be taken by this court as representing Collier's costs. The only figure which the court can assume as representing Gates' share on every sale was 34%. Gates was entitled to the 7% only when 50% of the purchase price had been paid within 15 months after the order. The 5% was to be paid Gates only for cash sales. The 12.5% was contingent upon the collection loss ratio being less than that figure, and the 1% was based upon a certain volume of sales. Thus, every other percentage save the initial sales commission of 34% was a contingent percent. It was manifest to the court from the fact that the percentages were contingent that Collier's costs fluctuated with collections, cash sales and volume. What Collier's costs were

the extensive ruling on point A as quoted in footnote 2 because it was conceded by both parties *that under the Japanese Foreign Exchange Laws an Import License was necessary to convert the Yen received from the book Sales to Japanese Civilians in Japan into U. S. Dollars.* An Import License was actually received by Colliers from the Japanese Government. Appellee Collier's own "Outline of procedure for opening a Branch in Tokyo, Japan" (Plaintiff Exhibit 9) admits that this was necessary. The trial court accordingly found with relation to necessity and extent of an Import License as follows:

"... All yen received were to be deposited in Collier's 'Japan Branch' account in Tokyo. Dollars collected in Tokyo were to be remitted directly to New York. *The amount remitted to Collier in New York on yen collected was to be the amount as limited by Collier's Import License.* . . . Collier . . . applied for and received a Japanese Import License so that Collier in New York could be paid for all of the books sent to the Japan office. . . . Collier's Import License allowed payment to Collier, out of Japan, for the 'full amount of invoice covering cost of books' the sum of \$172.50 per set of encyclopedia and accompanying books. The gross sale price of the set of encyclopedia with accompanying books was first fixed at \$269.50." (Emphasis ours) (Rec. 690 to 691) 256 F. Supp. 204, 206, 207.

Having so found, the question was whether "*Colliers in its invoices and application to remit funds padded and included in the \$172.50 sums illegal to remit.*" (Op. Br. 18) Mathematical percentages and just plain everyday

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under any given hypothesis were never proved by the plaintiff. Furthermore, what Collier's actual costs were on the actual sales made during the contract period were never presented to the court. The plaintiff having failed to show what Collier's true costs were, this court cannot find that the invoice 'cost' price of \$172.50, even assuming it was so intended, did in fact violate the J.F.E." (Rec. 700-702).

addition conclusively shows in this case that Gates' monies were sent out of Japan to New York. Furthermore Collier's counsel, Mr. Brown, *admitted* in open court that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of \$18,834.24 (U. S. Dollars) on account of the 12½% commission due from Colliers to Gates. (Tr. 385-387) The plain arithmetic is as follows:

- 1) Split of \$269.50 per set of books as provided in the contract of 1960 and 1961 and as illustrated per Plaintiff Exhibit 13 is as follows:

<u>Gates Rights (59.5%)</u>		
34%	\$84.83	
7%	17.47	
5%	12.50	
12.5%	33.69	
1%	2.70	\$151.19
<hr/>		
<u>Colliers Rights (40.5%)</u>		
40%	\$118.31	\$118.31
Total 100%		<u>\$269.50</u>

- 2) Figure \$172.00 was made up of the following:

Colliers Rights		
40.5%	\$118.00	\$118.00
Gates Rights		
12.5%	34.00	
7%	17.00	
1%	3.00	54.00
	<hr/>	<hr/>
		\$172.00

The above payment of \$18,834.24 was paid out of the total of \$204,632.50 which is the sum total of the \$172.50 per set of books sent from Tokyo to New York as per Import License. (Op. Br. 52) The confession by Collier's counsel

plus the above mathematical tests show that the trial court was in error. Collier's counsel cannot claim mistake in that Plaintiff's Exhibit 75 further shows 7% bonus payments from Collier to Gates in the United States out of the above mentioned yen remitted as U. S. Dollars the sum of:

\$23,357.49

262.05

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\$23,357.49

This exhibit was prepared and put into evidence by Colliers in its Tokyo District Court case. It again shows conclusively a substantial payment out of the \$172.50 licensed payments. Clearly, Gates' 7% commissions were also included in the padded remittances.

Reference is hereby made to pages 18 to 22 of Appellant's opening brief for further detailed argument on this point.

In the face of such plain arithmetic and admissions by Collier, it is submitted that counsel imposes on this court when he argues that a raise in the import license amount from \$69.00 per set to \$172.50 per set is due only to cost differences. The mathematics of the two contracts of 1960 and 1961 allows Colliers a raise from \$69.00 to \$118.00 per set. *The balance of \$34.00 plus \$17.00 plus \$3.00 or a total \$54.00 were "claimable assets" in Gates' favor. The statute clearly prevented the "direct or indirect transfer" of "claimable assets" unless licensed. See Article 30 of Japanese Foreign Exchange Law bottom of page 17 of Appellant's Opening Brief.*

This case is unlike *Dulles v. Katamoto*, 256 F.2d 545, 547 (9th Cir. 1958) (cited at page 18 Ans. Br.), a case relied upon by Colliers, in that with relation to the proof

of Japanese law in said case, no Japanese law of any nature whatsoever was proven. In that case the court stated:

"Its failure to produce *any such statements of the law or lawyer witnesses*, of the condition of the law makes its contention open to the inference that if produced they would have shown a Japanese American could teach a language foreign to Japan without ceasing to be an American citizen." (Emphasis ours)

In the present case, an official translated copy of the entire Japanese Foreign Exchange Law was offered and received in evidence. (Plaintiff's Exhibit 98) It was not only portions of the law but the Exhibit covered the purpose of the law, precise definitions of terms used in the law, the entire law itself and punitive provisions thereof. And there was no question that the said law applied to Colliers in that Colliers did receive an import license thereunder permitting remittances of \$172.50 per set. A total of \$204,632.00 (U. S. Dollars) was remitted under said import license. (See list footnote 10, page 52 of Opening Brief.)

Appellant also relies (Ans. Br. 18, 19) on *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209, but the decision on appeal of the Second Circuit Court of Appeals (297 F.2d 611) in said case clearly shows that what was supplied by the Panama attorney witness in the Bank case was agreed upon by the Colliers and Gates in the present case. In the said Chase Manhattan Bank case the statute was produced and the attorney witness was produced. He testified only as follows:

"... Chase (Bank) produced Senor Carlos Icaza, its Panamarian counsel. He testified that in his opinion Chase could not respond to the subpoena without subjecting itself to penalties under the Panamarian law and that American authorities could gain access to Panamarian records of American firms only by making



application through the Panamarian courts. He also stated that Law No. 17 is the only Panamarian law containing sanctions with respect to production of records in response to foreign process and that a violation of the Panamarian law would be equivalent to a misdemeanor under our criminal law. The government offered no evidence." 297 F.2d 611, 613.

The applicability of the Japanese Foreign Exchange Law to Colliers as above stated was clear and both Gates and Colliers agreed to this. In fact an Import license was obtained by Colliers in compliance therewith. The only question therefore was—the sudden raise from \$69.00 to \$172.50 of the licensed amounts—was there any padding therein?

The Court of Appeals, Second Circuit, said in the said *Application of Chase Manhattan Bank* at 297 F.2d 613, with respect to laws of friendly nations and attempts to circumvent said laws by United States companies as follows:

"In the instant case, the Government argues that compliance will not violate Panamarian law, since the subpoena is not directed to personnel in Panama but only to the head office in New York. . . . However, this would be nothing more than an attempt to circumvent the Panamarian law. *Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state. Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.*" (Emphasis ours)

It is requested that this court declare Collier's disgraceful "maneuver" with the Japanese Foreign Exchange Law illegal. Collier's it seems is accustomed to black market transactions ("Yami" in Japanese, meaning transac-

tions in the dark) in that it admitted paying \$.25 more per dollar to get money out by "maneuvers" out of Egypt. (Plaintiff's Exhibit 118) As stated by the Second Circuit in the above Chase Manhattan quotation, just as we would expect and require branches of Japanese business to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our United States businessmen who are permitted to do business in Japan. This court which must deal most closely with Pacific International problems should be the first to condemn the obvious "maneuver" Colliers attempted with the Japanese Foreign Exchange Law in this case. Plaintiff's Exhibit 9, "Procedure for Opening Tokyo Branch Japan" prepared by Colliers is a masterpiece on instructions on how to get around or "maneuver" the Japanese Foreign Exchange Law.

Therefore it is submitted Appellant Gates clearly sustained point A of his argument of illegality.

With respect to points B, C and D of Appellant Gates' contentions of illegality, it is submitted that since the complete Japanese statute was introduced in evidence and Colliers admitted that it is applicable to it and operated thereunder in Japan through its Tokyo office, the absolute prohibitions of the act as shown in the arguments B, C and D pages 22 to 26 of Appellant Gates' Opening Brief are applicable. If Colliers was licensed to ship out U. S. Dollars collected in Tokyo, Japan, it was Collier's burden and duty to produce it. In the absence of such production, the inference is that it had no such license. *Runkle v. Buraham*, 153 U.S. 216, 14 S. Ct. 837, and if there are any Japan court decisions or regulations to take Colliers out of the prohibitions in the Statute, Colliers had the burden of proof. It is stated in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 822, 68 S. Ct. 822, 827:

“First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of §2(a).”

See: *Javierre v. Central Altagracia*, 217 U.S. 502, 30 S. Ct. 598; *Schlemer v. Buffalo R. Co.*, 205 U.S. 1, 27 S. Ct. 407; 20 Am. Jur. 148. Such Japanese decisions on regulations, if any, are “facts” and must be proven by Collier as such. *Philip v. Macri*, 1958, C.C.A. 9, 261 F.2d 945, 75 A.L.R. 2d 523.

Since Appellee Colliers does not answer arguments C and D, it must be taken that Collier concedes that Appellant Gates’ position taken in C and D are so sound that Colliers cannot answer them. See: *Mower v. Street*, 79 Ariz. 282, 288 P.2d 495.

Appellee Colliers concedes by the position it takes in its Answering Brief that Appellant Gates’ arguments in paragraph II of Appellant Gates’ Opening Brief pages 26 to 27 are correct. It is entitled “Effect of Illegality of Contracts of April, 1960 and September, 1961”, and the law laid down in *Bulkin v. Reinfeld*, (1956 C.C.A. 2) 229 F.2d 215, cert. den. 325 U.S. 844, 77 S. Ct. 50, is quoted. Colliers doesn’t dispute Gates on this point but Point I of Collier’s Answering Brief pages 16 to 19 is based on the correctness of Gates’ position in paragraph II of his Opening Brief.

As for paragraph III of Appellant Gates’ Opening Brief pages 29-32 entitled “Count I of Plaintiff’s Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong Is Malum Prohibitum.” Counsel, Mr. Brown, admitted the correctness of Appellant’s argument in paragraph III (Tr. 471) and since he does not answer it, it

must be taken that Colliers does not dispute Gates' argument in paragraph III. A non answer is taken as an admission of the correctness of Gates' argument. See *Mower v. Street*, 69 Ariz. 282, 288 P.2d 498. Neither does Collier dispute the figures submitted by Appellant Gates in the event a quantum meruit recovery is allowed. (Op. Br. 31, 32)

## II

### **Japanese Law Governed Questions of Fraud and Breach of Contract.**

Appellee Collier in its Answering Brief at page 19 states as follows:

"But the law of New York properly applies to the issues of Gates' fraud and breach of contract. Accordingly, there was no necessity for Collier to prove the law of Japan to establish its defense and counter-claims."

Appellant disagrees. First of all in relation to conflicts of law on contracts the Supreme Court of Hawaii in the case *In re Frances de Flanchet*, 2 Haw. 96, 109, held as follows:

"A different rule obtains in relation to contracts. Justice is to be administered in our Courts according to our laws and forms of proceeding, though the action be founded on a contract made in another State or country, the *lex loci* applying only to the construction and effect of the contract. Every country has its own modes of redress and judicial proceedings peculiar to its own jurisprudence. The *lex loci* has reference to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. Justice demanded that this comity should exist between nations, and it has become incorporated into the Code of National Law in all civilized countries. (14 Johnson's Rep., Cowp., 343; 1 Johnson's Cases, p. 140; 1 Gallison's Rep., 371.)"

Appellee Collier's assertion that there is no Hawaiian case on the subject is misleading. The "Lex loci" in a contract case is so well expressed in the quotation from 50 A.L.R. 2d 254, pages 33-34 of Gates' Opening Brief that it will not be repeated herein. More recently in *Sperry Rand Corporation v. Industrial Supply Corporation*, (C.C.A. 5) (1964) 337 F.2d 363, the court stated:

"The Supreme Court has stated, as the general conflicts rule pertaining to contracts, that matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made; matters connected with its performance are regulated by the law prevailing at the place of performance; and matters respecting the remedy depend upon the law of the place where the suit is brought. *Scudder v. Union National Bank*, 91 U.S. 406, 23 L. Ed. 245."

*That the intention of the parties was that the Law of Japan should apply to the contracts of 1960 and 1961 is clear from the following provision contained in "Procedure For Opening Tokyo Branch Japan." (Plaintiff Exhibit 9)*

"10. *Salesmen—Independent Contractors:*

The law (meaning the law of Japan) governing free lance is basically very similar to that in the United States in that a free lance salesman dealing strictly on a commission basis will be considered an independent contractor, and the company would not be liable to third parties as employer." (page 4)



"7. *Japanese Bank Account:*

(d) All yen collected will be deposited, but the amount remitted will be the amount limited as per our Import License" (page 3)

"8. *Tax Liability:*

As advised by Tokyo Attorney, Mr. James S. Adachi, the Branch of a foreign corporation in Japan is treated as a separate entity. . . ." (page 4)

It is submitted that the foregoing was equivalent to a stipulation in the contract that the parties shall be governed by Japanese Laws. Parties may agree in their contracts as to what law shall apply. 16 Am. Jur. 2d 71, Section 46. *Aluminum Co. v. Hully*, (C.C.A. 8) (1952) 200 F.2d 257; *Overseas Trading Co. S.A. v. United States*, 141 Ct. Cl. 561, 159 F. Supp. 382; *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416.

Appellee Collier attempts to argue that the "center of gravity" or "grouping of contracts" rule should govern this case. (Ans. Br. 23) But in the very jurisdiction (N.Y.) Appellant Collier says the laws whereof should apply, the "center of gravity" or "grouping of contracts" rule is subject to a recognized exception that when the parties contract with the law (Statutory) of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract, as the law which the parties presumably intended to be controlling. *Hausman v. Buckley*, (C.C.A. 2) (1962) 299 F.2d 696, 93 A.L.R. 2d 1340. In the said case, a derivative action by a minority shareholder of a Venezuelan Corporation was dismissed for the following reasons:

" . . . Thus defined, we think it is clear that Appellants' position cannot prevail. A rule which provides that the enforcement of corporation claims through derivative actions must be undertaken pursuant to the will of a majority of its stockholders reflects a deliberate policy that such actions ought to be brought not only when the claims may have merit but when the stockholders, as a body, are of the opinion that the corporate welfare is best promoted by suing upon them. The issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought." . . .

"*'But a statute of the place where the right arose may impose upon it a condition which goes to its substance, and, when this is so, the condition will be observed elsewhere. This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself. . . . But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition.'* Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942-943 (C.C.A. 2, 1930) (L. Hand, J.)." (Emphasis ours)

See also:

*Pinney v. Nelson*, 183 U.S. 144, 22 S. Ct. 52.

*Levy v. Daniels U-Drive Auto Renting Co.*, (1928) 108 Conn. 333, 143 Atl. 163.

*Bradford Electric Light Co., v. Clapper*, (1932) 286 U.S. 145, 52 S. Ct. 571 (Rt. by way of defense).

*Broderick v. Rosner*, 294 U.S. 629, 55 S. Ct. 589.

*Broderick v. McGuire*, (1934) 119 Conn. 83, 174 Atl. 314.

In the present case the contract contemplated sales in Japanese Yen and it contemplated conversion of said yen into U. S. Dollars. As admitted by the parties, an Import

License was absolutely necessary and the Japanese Foreign Exchange Control Act was interwoven in the contract. Charges of fraud by Colliers necessarily involved defenses by Gates involving the said Exchange Act. See arguments VI (B) (C), pages 49-61, Op. Br. Both of the Japan Sales Contracts between Gates and Colliers would have been useless if Colliers couldn't get U. S. Dollars out of Japan. The Japanese Foreign Exchange Act was the backbone of the Tokyo contract and it was as much a part of the contract as the law of Venezuela was with relation to shareholder's rights of Venezuelan corporations in *Hausman v. Buckley* abovementioned. Where foreign statutes are involved the courts will enforce the foreign statutes together with the law of that country (Japanese law in the present case).

The foregoing exception stated in *Hausman v. Buckley* applies to tort cases as well. See: *Bradford Electric Light Co. v. Clapper*, *supra*; *Pearson v. Northeast Airlines*, (C.C.A. 2) (1962) 309 F.2d 553, 92 A.L.R. 2d 1162.

And finally just for argument, without admitting, if the "center of gravity" theory is to be applied in this case Japan was the "center of gravity", the place "*which has the most significant contacts with the matter in dispute*". The case of *Auten v. Auten*, (1954) 308 N.Y. 155, 124 N.E. 2d 99, relied upon by Colliers on page 23 of its Answering Brief was a case involving domestic relations. In that case the court based its decision on the marital situs of the parties, England. The center of gravity of the contracts in this case is what the parties in their contract designated by agreement as headquarters of the "Asiatic Division of Collier" (Plf. Ex. 1 and 2), that is to say Tokyo, Japan; Colliers registered itself under the Japanese laws intending to be covered in its activities by the Japanese law and treated as a separate entity (Plf. Ex. 9 page 4); it paid Japan income

taxes; Gates had purchased a place of business as well as a home in Tokyo, Japan; Gates was to sell in Japanese Yen and convert it into U. S. Dollars (In *Auten v. Auten*, *supra*, the court emphasized that payments were to be in pounds); the remittances were governed by the Japanese Foreign Exchange Act by Import Licenses; the alleged fraud (if any) all took place in Japan; Colliers received its licensed import payments as per license in the total sum of \$204,632.50 (Op. Br. 52); Colliers complains in this case that the alleged defrauded amounts should have been deposited in Collier's Tokyo bank account, in other words the alleged non-payment (if any) took place in Tokyo; the Japanese court in Tokyo issued an injunction when a dispute arose; the effect of this Japanese Court Injunction is one of the critical issues in this case (Op. Br. 39); Colliers and Gates first sued each other in the Japan courts on this cause of action; Collier's 15 independent contractor salesmen (determined as per agreement by Japanese law) in Japan were Japanese; basic records of the business were kept in Japanese; Colliers maintained an inventory of books in Japan; sales were made in Japan; a complicated debtor and creditor relationship in Japanese Yen developed in Japan between Gates and Collier (Tr. 89-90); the multitude of buyers were Japanese; Collier's auditors audited Gates' books in Japan; most Collier report forms were filled in and made in Japan; collections were made in Japan and all other acts incident to all the foregoing were all done in Japan. In such cases, even under the center of gravity cases, the law of the place where the goods were sold becomes applicable. See especially *Sperry Rand Corporation v. Industrial Supply Corporation*, (C.C.A. 5) (1964) 337 F.2d 363 where the court held the law of Florida where the computer mechanism was sold as being applicable and stated:

"In Pennsylvania the law of the place of performance would govern. *Victorson v. Albery M. Green Hosiery Mills, Inc.*, 3rd Cir. 1953, 202 F.2d 717, 41 A.L.R. 2d 806; *Texas Motorcoaches v. A.C.F. Motors Co.*, 3rd Cir. 1946, 154 F.2d 91. Such is also the rule of Delaware. *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 3rd Cir. 1951, 190 F.2d 817. The same doctrine is said to apply in Ohio. *Delta Tank Manufacture Co. v. Weatherhead Co.*, D.C.N.D. Ohio, 150 F. Supp. 525, aff. 6th Cir. 1958, 254 F.2d 602. In New York the newly developed center of gravity theory would be applicable. *Royce Chemical Co. v. Sharpless Corporation*, 2nd Cir. 1960, 285 F.2d 183; *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R. 2d 246.

"The modern text writers seem to favor the *application of the law of the situs of the property at the time of the sale*. See 15 C.J.S., Conflict of Laws, § 18d, pp. 929-930, 11 Am. Jur. 355, Conflict of Laws, § 69; 2 Beale, Conflict of Laws 981 et seq., §§ 255.5, 256.1-258.1; *Lalive Transfer of Chattels in the Conflict of Laws* 48-59, 142; *Carnahan, Tangible Property and the Conflict of Laws*, 2 U. of Chi.L.Rev. 345; *Rest. Conflict of Laws*, §§ 255-259." (Emphasis ours)

See also *Royce Chemical Co. v. Sharpless Corporation*, (C.C.A. 2) (1960) 385 F.2d 183, where a New York seller of a textile centrifugal machine sold said machine to a New Jersey buyer. The machine didn't work and buyer sued seller in the Federal District Court of New York (S.D.) on rescission for fraud. The court held:

"(1, 2) Under *Klazon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, we are obliged to apply the conflict of laws principles of New York, the state in which the district court sat. We agree with that court that under New York's conflicts rules, *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R. 2d 246, the law of New Jersey is applicable here."



“(9, 10) We must apply the conflicts rule as would a New York court. We believe that under the ‘center-of-gravity’ theory of *Auten v. Auten*, *supra*, the New York courts *would apply the law of New Jersey—the state with the most significant contacts—to the question of interest as an item of damage, as well as to other questions relating to the contract’s performance*. Cf. Restatement, Conflict of Laws, §§ 358, 413, 418; *Blankenship v. Rountree*, 10 Cir., 238 F.2d 500.” (Emphasis ours)

Therefore appellee Colliers by its failure to prove the substantive law of fraud of Japan completely failed in its proof of its case.

### III

#### **Appellee Colliers Did Not Show Contracts Were Separate nor Divisible.**

Appellee Colliers in its Answering Brief at page 25, searches the trial court’s decision attempting to locate the trial court’s finding that the 96B (Military), 97B and 99B (Japanese Civilian and Schools) and 98B (Australian) contracts were not separate contracts, nor were they divisible. Its quoted portion of the trial court’s opinion fails to make a finding of divisibility or separateness.

The trial court found with relation to the Australian contract as follows:

“Towards the end of 1961, Collier and Gates decided to open up a Collier branch in Australia, and did so in January, 1962. However, as to the Australian operation it was agreed that Gates would act as an independent contractor and not as an employee of Collier and would be entitled to a 36% basic sales commission. Collier would open its own branch there to handle only the cash accounts receivable and the inventory of books, all sales to be under the control of Gates.” (Rec. 692)

Therefore the court did find the Australian operation to be covered by a separate contract.

But assuming that the trial court found as Collier contends, as for Collier's attempt to rely on the "clearly erroneous" rule regarding fact findings, Appellant Gates submits that where as in this case most of the evidence is documentary and undisputed, and the question involves not only facts but it is necessarily one of fact and law, the said "clearly erroneous" rule is not applicable. It is submitted that when facts are undisputed, though no finding is made, case need not be remanded. *Yanish v. Barber*, (1956) (C.C.A. 9) 232 F.2d 939. Trial Court's findings of fact induced by an error of law are not binding. *Smallfield v. Home Ins. Co. of N. Y.*, (C.C.A. 9) 1957, 244 F.2d 337. When findings essentially deal with effect of certain transactions or events, rather than resolving disputed facts, appellate court not bound by "clearly erroneous rule". *Stevenot v. Norberg*, C.C.A. 9, 1954, 210 F.2d 615. Where all of the evidence is documentary Court of Appeals not limited by findings below on factual questions, *Agrashell Inc. v. Bernard Sirotta Co.*, (C.C.A. 2) (1965) 344 F.2d 583. Findings which were unsupported by the record, findings which were conclusions of law and ultimate findings or mixed findings of fact and law were not binding on court of review. *Official Creditors Committee of Fox Markets Inc. v. Ely*, (C.C.A. 9) (1964) 337 F.2d 461, cert. den. 85 S. Ct. 1342, 380 U.S. 978; *Weible v. U. S.*, (C.C.A. 9) (1957) 244 F.2d 158.

It is submitted that Collier's inadequate attempted answer to Gates' argument of divisibility shows that Colliers has "no reply" to Gates' argument.

## IV

**Appellee Colliers Cannot Dispute Appellant Gates' Following Unanswerable Arguments.**

It is significant that because of the overwhelming law and undisputed facts (documentary as well as agreed facts) in favor of Appellant Gates, Appellee Colliers cannot and did not answer the following points raised by Appellant Gates in his Opening Brief:

(Numbers correspond to those in Opening Brief.)

- I. The April, 1960 and September, 1961, Gates-Collier Contracts Were Flagrant Violations of the Foreign Exchange and Foreign Trade Control Law of Japan.
  - C. Contracts of April, 1960 and September, 1961, Were Service Contracts Which Required Prior Approval. (Op. Br. 24, 25)
  - D. Illegal to Send Book Orders from Tokyo to New York. (Op. Br. 25, 26)
- II. Effect of Illegality of Contracts of April, 1960 and September, 1961. (Op. Br. 26-28)
- III. Count I of Plaintiff's Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong is Malum Prohibitum. (Op. Br. 29-32)
- V. Trial Court Erred in Finding That the Tokyo District Court Pro-Tem Decree Was Fraudulently Obtained. (Op. Br. 39-42)
- VI. Assuming That Appellant's Arguments in Paragraphs I, II, III, IV and V of this Brief Are Untenable, Colliers' Evidence Was Insufficient to Sustain Court's Judgment on Counterclaim and Colliers Did Not Prove Any Defense of Fraud.

- B. Colliers' Exhibits B-13A, B and C Were Only Book Entries; No Conversion Was Proven, Therefore No Action in Fraud May Be Maintained. (Op. Br. 49-56)
- C. Colliers Failed to Prove Alleged Fraud Proximately Caused Pecuniary Losses. (Op. Br. 56-60)
- D. Colliers Rescinded Its Contract of September, 1961 and Cannot Sue for Future Liabilities to Arise under Said Contract. (Op. Br. 60)

It is submitted that where Appellee Colliers failed to answer the Appellant's brief, such a failure is a confession on the part of Appellee of reversible error. *Mower v. Street*, 79 Ariz. 282, 288 P.2d 495.

And as in this case, where most of the facts are undisputed, the case need not be remanded. This court may make proper findings. *Yanish v. Barber*, (C.C.A. 9) (1956) 232 F.2d 939. Appellee on page 2 of its Answering Brief states in bold dark type: "The Basic Facts Are Uncontroverted."

## CONCLUSION

For the reasons abovestated, it is submitted that the decision of the court below should be set aside and judgment for the amount \$422,804.98 should be entered in favor of Appellant and against Appellee. The figures in Ex. CC page 75 Op. Br. are figures obtained from figures admitted by Colliers in answers to interrogatories. (Rec. 114 to 279) Even if Appellant was once only an Oregon orphan boy he should not be deprived of his just commissions after selling \$1,810,262.00 worth of books. Colliers received \$1,004,644.22. (Ex. F.E., page 79 Op. Br.) Gates

has received only \$398,434.71. (Ex. E.E. aforesaid) Gates' request is not only just but mathematically correct.

Dated: December 9, 1966.

Respectfully submitted,

KASHIWA AND KASHIWA

By .....

SHIRO KASHIWA

*Attorney for Appellant*

### **CERTIFICATION OF CONFORMITY**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KASHIWA AND KASHIWA

By .....

SHIRO KASHIWA

*Attorney for Appellant*

















